This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 053 484 978

L
150

Bd. Jan. 1932

HARVARD LAW LIBRARY

Received AUG 27 1931

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

152
Dec 8

McMASTER'S

COMMERCIAL DECISIONS

BLAIR & CO
NEW YORK

AFFECTING THE

BANKER AND MERCHANT

FROM THE

DECISIONS OF THE HIGHEST COURTS OF THE SEVERAL STATES.

By J. S. McMASTER

Examiner New York State Bank Department

VOL. XII.

THE COMMERCIAL BOOK COMPANY
69 Wall Street, New York.

ALBANY:
WEED-PARSONS PRINTING CO.
1909.

Digitized by Google

BLAIR & CO
NEW YORK

AUG 27 1931

Digitized by Google

INDEX.

ACCEPTANCE:

There is an implied representation on the part of the drawer of a bill of exchange that he has funds in the hands of the drawee sufficient to pay the bill, and when the bill is accepted by the drawee he admits the truth of this implied representation. The Negotiable Instruments Law provides that when a bill is dishonored by non-acceptance the holder had an immediate right to recourse against the drawer and indorsers and under this law it has been held that although the will is payable at a fixed time, it may be presented for acceptance at any time, and if the acceptance is refused or cannot be obtained, the holder may treat the bill as dishonored. Page 85a, No. 1098.

A party purchased a draft drawn by one bank on another bank, which was to be placed to the credit of the payee in the bank upon which the draft was drawn, and a certificate of deposit issued to the payee, the certificate of deposit was issued, when it was discovered by the latter bank that payee's indorsement was lacking and the draft was returned to the party presenting it, the bank having stamped on the draft that "on its return properly indorsed will be placed to the credit of (naming payee)." The bank, which was the drawer, failed and the drawee bank was held liable on the theory that it had accepted the draft. Page 226a.

ACCEPTOR:

Where the drawer of a draft sold goods to the drawee and drew a draft payable to the order of himself and indorsed by him to a bank and the drawee accepted the draft and was sued by the bank, the indorsee, he could not set up the defense of failure of consideration as between him and the drawer, for the reason that a defense available to the acceptor against the drawer is not available to an innocent third party, who is a holder in due course. Page 209a, No. 1126.

ACCOMMODATION INDORSEMENT:

While the maker of a note is impliedly bound to reimburse one indorsing it for his accommodation for any payment the indorser may be compelled to make, he cannot sue the maker until he has made the payment. Page 287a, No. 1154.

ACCOMMODATION PAPER:

Where an indorsee of a note brought action thereon against the maker on a statement of claim which did not aver that plaintiff was a bona fide holder, and affidavit of defense averring that the note was taken after notice of payee's defective title, and that no consideration passed, was sufficient, and put plaintiff on proof of the bona fides of the transaction. 15a, No. 1086.

No consideration moving to an accommodation maker of a note is necessary to uphold it; the consideration supporting the promise of the maker being that parted with by the person taking the accommodation note and received by the person accommodated. It is no defense to the maker of an accommodation note that the holder other than the person accommodated, whether indorsee or transferee for value, knew before or when he took the note that the accommodation maker received no consideration therefor. Negotiable Instruments Law, providing that in the hands of a holder other than the holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable, applies to an accommodation note transferred after maturity. Page 280a, No. 1143.

Accommodation paper has no legal inception until negotiated for value. The taking of accommodation note, either as conditional payment on an account or as collateral security for an antecedent indebtedness, is for value, where there is no fraudulent diversion of the notes from a restricted use imposed by the maker. Page 292a, No. 1163.

One who acquires a negotiable instru-

Digitized by Google

ACCOMMODATION PAPER — Cont'd.
ment for a pre-existing or antecedent indebtedness is a holder for value and may recover against an accommodation party to the note, notwithstanding the fact that he knew when he took the note that such party was an accommodation party. Page 224a.

ACCOMMODATION PARTY:
Under the Negotiable Instruments Law the accommodation maker of a promissory note is not discharged by an agreement between the holder of the note and the co-maker, extending the time of payment, for the reason that the accommodation maker of a note is not a party secondarily liable, but primarily liable, being absolutely required to pay the note. Page 202a, No. 1123.
Where the drawer of a draft had agreed with the indorser of a draft that he would extend credit to the drawee provided the indorser would guarantee the draft by his indorsement and the draft was subsequently drawn payable to the order of the drawer and accepted by the drawee, having been previously indorsed by the indorser before its delivery, the indorser is liable to the drawer of the draft, because parol evidence may be introduced to show what is the respective liability as between indorsers and after acceptance the draft is virtually a promissory note made by the acceptor and payable to the payee. Page 191a, No. 1119.

ACCRUAL OF RIGHT OF ACTION:
Limitations on an action by a surety against the principal for reimbursement run, not from the time when the debt was due, but from the time when the surety paid it. Page 287a, No. 1154.

ADJUDICATION:
In an action by a trustee in bankruptcy to avoid a deed by the bankrupt as an unlawful preference under the Bankruptcy Act, an adjudication of bankruptcy on the express ground that, when the deed was made within four months preceding the filing of the petition, bankrupt was insolvent, is conclusive against defendant grantee. Page 277a, No. 1140.

AGENCY:
To constitute a partnership the member must join together in a common

AGENCY — Continued.
enterprise, each contributing either property or services and they must have a community of interest in the profits. If there is an agreement to share the profits, prima facie this amounts to an agreement to share the losses. Mining partnerships exist if each partner has a personal interest in the working of the mine. Agency results from the existence of the partnership and not the partnership from the fact of agency. 75a, No. 1094.
The president and director of a trust company, who is also a director of a bank, induced other directors of a bank to execute a note on the pretense that the bank was temporarily in need of funds and expressly agreeing that the note was not to be discounted until the signatures of the other directors of the bank had been attached to the note. Notwithstanding the agreement, he caused the note to be discounted by the trust company without procuring the additional signatures and without consulting the board of directors of the company. His knowledge that the note was fraudulently negotiated could not be attributed to the company of which he was the president and a director. 39a, No. 1090.
The agent cannot represent both parties to the contract. Where he has received a commission from the seller of a piece of machinery, he cannot recover on a promissory note, which was given to him as a bonus, from the purchaser of the same machinery. This note would be voidable at the option of the maker, because the consideration failed by reason of the duel capacity of the agent. Page 118a, No. 1110.

ANTECEDENT INDEBTEDNESS:
One who acquires a negotiable instrument for a pre-existing or antecedent indebtedness is a holder for value and may recover against an accommodation party to the note, notwithstanding the fact that he knew when he took the note that such party was an accommodation party. Page 224a.

ASSIGNMENT:
Though the assignment of a note for value and without notice is without due course, the defenses to which it is subject are only those existing at the time of the transfer, and not

Digitized by Google

ASSIGNMENT — Continued.

those which possibly may at some future time exist, so that the note having been given for advances to be made subsequently, failure of the payee to make them will not prevent recovery by the assignee. Page 295a, No. 1171.

ASSIGNMENT WITHOUT INDORSEMENT:

Where a note, secured by a mortgage, to take effect immediately, is given to a dealer therein for money to be advanced subsequently, the maker is estopped to assert failure to advance the money, as against one who took the same from the payee for value and in good faith, without negligence, though the taking was without an indorsement, essential to due course; the rules of the law merchant giving way to the supreme rule of estoppel in pais. Page 295a, No. 1171.

BANKRUPTCY:

In an action by a trustee in bankruptcy to avoid a deed by the bankrupt as an unlawful preference under the Bankruptcy Act, an adjudication of bankruptcy on the express ground that, when the deed was made within four months preceding the filing of the petition, bankrupt was insolvent is conclusive against defendant grantee. Page 277a, No. 1140.

In a suit by the trustee in bankruptcy of a partnership to recover payments made to a creditor as a preference to authorize a recovery it must be shown that the firm and the partners also were insolvent when the payments were made. To render a payment made by a bankrupt to a creditor voidable as a preference under Bankruptcy Act it must appear that it was in fact intended to give a preference and that the creditor had reasonable cause to believe that it was so intended, and mere suspicion or slight proof is not sufficient. No. 1141.

A trustee in bankruptcy can recover land by showing that bankrupt was insolvent when he deeded it to defendant; that the transfer enabled defendant, as a creditor, to obtain a greater percentage of his debt than other creditors of the same class; that defendant had reasonable cause to believe that the conveyance was intended to give him a preference, and that the petition in bankruptcy was filed within four months after

BANKRUPTCY — Continued.

the deed was recorded. Page 277a, No. 1140.

A note pledged by a third party as security for the payment of a debt stands in the position of a surety for the payment of the principal debt, and funds paid upon the pledged note will be applied upon the debt secured. No. 1168.

BANK AND DEPOSITOR:

A banker is guilty of no breach of trust or impropriety in using funds coming into his custody from general depositors, his relation to them being that of debtor and creditor, and in no sense that of trustee or cestui que trust. No. 1164.

BANK DEPOSITS:

A depositor in a savings bank changed the deposit standing in her name so as to make it payable to herself or another, her daughter, or survivor. The change was made under the depositor's written direction to the bank to add the name of her daughter as "owner and creditor" of all moneys deposited under the account. Subsequently thereto the depositor made a will disposing of her savings bank deposit and giving it to her daughter. Held, that the daughter was a joint owner of the deposit, and the depositor's disposition of the deposit by will did not destroy the daughter's rights. No. 1157.

A depositor in a savings bank changed the deposit standing in her name so as to make it payable to herself or another, her daughter, or survivor. The change was made under the depositor's written direction to the bank to add the name of the daughter as "owner and creditor" of all moneys deposited under the account. Subsequently thereto the depositor made a will disposing of her savings bank deposit and giving it to her daughter. Held, that the daughter was a joint owner of the deposit, and the depositor's disposition of the deposit by will did not destroy the daughter's rights. No. 1158.

BANKS:

A bank, which discounts paper for a depositor and gives him credit for the proceeds, is not a "bona fide holder" for value, so as to be protected against infirmities in the paper, unless some other consideration passes, such transaction merely creating the relation of debtor and

Digitized by Google

BANKS — Continued.

creditor between the bank and the depositor; and so long as that relation continues and the deposit is not withdrawn the bank is subject to the equities of the prior parties, though the paper is taken before maturity and without notice. Page 279a, No. 1142.

BANKS AND BANKING:

To constitute a gift, the donor must renounce all claim or interest in the subject of the gift and there must be a delivery. Where a depositor deposited money in a bank to the credit of herself and another, and it was shown on the trial that she had retained control of the deposit and kept the bank book, this did not prove a gift, or a joint tenancy, it being also proved that the account stood in the joint names of the depositor and another so that the other party might act as agent for the depositor in relation to this fund. 17a, No. 1087.

The president of a national bank had written a State bank obligating his bank to pay all checks of a corporation not aggregating more than $5,000 weekly, and the national bank afterwards telegraphed that it would protect the corporation's checks for $5,000 weekly in excess of present guaranty, and later that the State bank would pay checks in excess of guaranty drawn during the current week. The bank cashed some of the checks, and before the checks could be paid by the national bank, the national bank failed and the drawer of the checks also failed, it was held that the State bank had no right of action against the national bank on the guaranty, as the president of the national bank had exceeded his powers and the State bank was chargeable with notice that the credit and resources of the national bank were being unlawfully used. 29a.

Where an employee of a railroad company erased the name of the real payee of a warrant and substituted the name of another payee, the name of the other payee in the forged instrument was either a fictitious party unknown to the drawer or real entity, and where the warrant was cashed by a Denver bank and forwarded to a Detroit bank which was one of the general depositors of the railroad for payment and the Detroit bank paid the warrant, the burden of proof is on the Detroit bank to show either that

BANKS AND BANKING — Continued.

the payee was a fictitious party and known to be fictitious by the maker or that the money was paid to the party mentioned in the warrant if such a person was real entity. 3a, No. 1081.

It is not negligence for a bank to pay a check which was written on the blank form of another bank, nor is it negligence for the bank to pay a check, the body of which is not in the handwriting of the maker. The bank is only required to know the signature of the drawer. Page 116a, No. 1109.

Where the signature of a check was forged and the check was given for the payment of city assessments upon the land of certain individuals, and the bank, upon which the check was drawn, having paid the check, the bank could not recover from the defendants, whose assessments the check had paid, because the drawee of a bill of exchange is presumed to know the drawer's signature and if he accepts or pays the bill to which the drawer's name has been forged, he cannot repudiate the acceptance or recover the money. Page 149a.

The plaintiffs forwarded to their agent a check payable to one of their customers. The agent forged the customer's name and deposited the check in the bank to the credit of L. & Co. The agent was indebted to the plaintiffs, and upon being asked to pay his indebtedness, transferred the amount on deposit to the credit of L. & Company, to the credit of the plaintiffs. The forged check was paid by the bank upon which it was drawn and charged to the account of the plaintiffs, and the plaintiffs sued the bank but were unable to recover for the reason that the money realized upon the forged check had been returned to them. Page 127a, No. 1115.

A member of the New York Clearing House held as security for the account of a non-member certain bills receivable and cash. The non-member went into the hands of a receiver on a certain day and the business day following the member paid certain checks of the non-member and sold or collected to reimburse itself the collateral. The rules of the New York Clearing House provide that a member bank cannot cease to pay the obligations of a non-member bank except upon notice to the other banks and this notice does not take effect until the

Digitized by Google

BANKS AND BANKING — Continued.
exchanges of the following morning. Consequently, although the member bank paid these checks drawn upon the non-member bank the day after the non-member bank went into the hands of the Superintendent of Banks and with knowledge of the insolvency of the non-member bank, the receiver of the non-member bank could not recover from the member bank the value of the securities which it had sold to reimburse itself for the checks paid, drawn upon the non-member bank. Page 130a, No. 1116.
Where a depositor does not know that a bank is insolvent, he having heard rumors to that effect, goes to the bank and is assured by the bank's officers that the bank is solvent and he withdraws his money from the bank, the money so paid him is not impressed with a trust in favor of the other creditors of the bank and where with this money he purchases a New York draft and the bank where he had his deposit subsequently goes into the hands of receivers, he is entitled to be subrogated to the rights of the bank upon which the draft was drawn in the collateral, which is in the hands of the receivers of the insolvent bank. Page 124a, No. 1113.
Notwithstanding the fact that the rules and regulations of a savings bank, which are printed upon the pass book of the depositor and to which the depositor agrees, require that a depositor must give notice of a lost or stolen book and if the bank pays out the money upon the presentation of the deposit book, it will not be liable, the Supreme Court of Ohio held that the bank must exercise good faith and use reasonable care in making such payment otherwise it would be liable to the depositor. Page 97a.
Where the maker's signature to a check was forged and the name of the payee was also forged and a check was accepted by the bank upon which is was drawn, and subsequently deposited in another bank and paid by the bank upon which it was drawn, the bank upon which it was drawn could not recover of the bank where the check was deposited upon discovery of the forgery; also held that the check was payable to a fictitious payee and therefore was payable to bearer, and the bank upon which it was drawn should have accepted the check, a

BANKS AND BANKING — Continued.
bank being supposed to know the signatures of its depositors. Page 112a, No. 1108.
A bank cannot charge to a depositor's account a check upon which the name of the payee has been forged; but it is the duty of the depositor to promptly notify the bank of a forgery after its discovery by him, and in case he does not, he cannot recover from the bank if the bank charges to his account the forged check. Page 198a, No. 1122.
Where a party gives his agent a note for collection and the debtor gives a check in payment of the note to the agent, and the agent presents the check to the bank upon which it is drawn for payment and indorses the name of the principal, to whom the check is payable, and the bank pays the check, the principal may recover from the bank, because an agent with authority to collect a note does not also have authority to indorse the name of her principal to the check. Page 204a, No. 1124.
Where a draft was drawn by a bank to the order of a payee, of whose existence it had no knowledge and the payee's indorsement was forged and presented to another bank for deposit and subsequently paid by the bank upon which it was drawn, the bank upon which it was drawn could recover from the bank to whom it paid the money on the theory that the bank presenting the draft for payment had no title to it for the reason that the indorsement of the payee was a forgery. The fact that this draft was payable to a person of whose existence the bank had no knowledge and the person requesting the draft never intended the payee to have it, did not make the draft payable to bearer for the reason that the drawer of the draft, a bank in this instance, did not know that the draft was payable to the fictitious payee. Page 218a.
T. deposited money to S. Co.'s credit in defendant bank conditionally. Though the condition never arose, the company drew a check for the amount in favor of plaintiff, and a bank officer who did not know of the condition credited plaintiff with the amount in a passbook issued to it. Before any account was opened on the books, it was discovered that deposit was not subject to check, and the S. Co. was notified within twenty-four hours, the check was returned, and defendant refused to

Digitized by Google

BANKS AND BANKING — Continued.
transfer the account. It does not appear that the plaintiff was a bona fide purchaser of the deposit or that its position was changed between the issuance of the passbook and the notice of the S. Co. Held, that defendant was not bound by the credit indicated by the passbook. A bank with which money was deposited to the credit of a third party to be paid on condition imposed for the depositor's benefit could not pay any part of it on the depositor's check until the condition was met. No. 1145.
If a person deposits in a bank for his credit a check, and it is presently treated between such person and such bank as money, the former obtaining credit upon which he may, at his pleasure, draw for money, section 4541, St. 1898, is satisfied as regards a deposit of money. No. 1146.
A bank receiving a deposit with notice that it is made to meet outstanding checks drawn by the depositor may not charge the depositor's account with a debt due it from him, and thus defeat collection of the outstanding checks. No. 1170.
A general deposit is where the bank is given custody of the money deposited with the intention expressed or implied that the bank is not required to return the identical money, but only its equivalent, the legal title to the money in such cases passing to the bank. A special deposit is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive the identical thing deposited, in which case the title remains with the depositor, and if the subject be money, the bank has no right to mingle it with other funds. In the absence of proof to the contrary, a deposit in a bank is presumed to be general, and it devolves upon the party claiming the contrary to show that it was received by the bank with an express or clearly implied agreement that it should be kept separate from the other funds of the bank and the identical money or property be returned to the depositor. No. 1164.
In a distribution of the funds of an insolvent bank all general depositors should share equally. A deposit of money in a bank by one who sustains fiduciary relations to the funds, and who deposits the money for the benefit of another with the knowledge of the banker, was not entitled to any priority at the distribution of the assets on the bank's insolvency, where there was no understanding that the deposit should be treated as a special deposit. No. 1164.
A banker is guilty of no breach of trust or impropriety in using funds coming into his custody from general depositors, his relation to them being that of debtor and creditor, and in no sense that of trustee or cestui que trust. No. 1164.
Where a check for a ward's share of an estate was payable to both the ward and the guardian, and the bank where it was deposited knew that the money was the ward's, it cannot be relieved from liability for applying the proceeds of the check to payment of a debt due it from the guardian individually. No. 1165.
When defendant paid a check drawn on it, marking it paid, crediting it to the indorsee's agent's account, and charging it to the drawer's account, the transaction was irrevocably closed; defendant becoming indebted to the agent and being powerless to subsequently charge the check back. Page 289a, No. 1159.
A by-law of a savings bank provides that payments to persons presenting a passbook issued by the bank should discharge the bank, though the bank would endeavor to prevent fraudulent payments. Held, a contract by the bank to take ordinary care not to pay other than the depositor, but saving it harmless on payments of the deposit to one other than the person rightfully entitled thereto on presentation of the passbook. Where the bank book of a depositor in a savings bank has been stolen, it will not defeat an action by the depositor to recover a balance to his credit in the bank that he is unable to produce the book, though there is a statutory requirement that no savings bank may make any payment except on production of the book. No. 1162.
The certificate by a bank that a check is good is equivalent to acceptance and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. The transfer of a certified check is an assignment of money to meet it, and the bank making the

Digitized by Google

BANKS AND BANKING — Continued.
certification is liable therefor to the holder. The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay, and a bank that has received a certified check for deposit and has credited the depositor with the amount of it is a bona fide holder and may enforce payment of it, notwithstanding it may, before payment to the depositor, having received notice that the check was fraudulently obtained by the depositor. Page 288a, No. 1155.

BILLS AND NOTES:
No consideration moving to an accommodation maker of a note is necessary to uphold it; the consideration supporting the promise of the maker being that parted with by the person taking the accommodation note and received by the person accommodated. It is no defense to the maker of an accommodation note that the holder other than the person accommodated, whether indorsee or transferee for value, knew before or when he took the note that the accommodation maker received no consideration therefor. Negotiable Instruments Law, providing that in the hands of a holder other than the holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable, applies to an accommodation note transferred after maturity. Page 280a, No. 1143.
A bank, which discounts paper for a depositor and gives him credit for the proceeds, is not a "bona fide holder" for value, so as to be protected against infirmities in the paper unless some other consideration passes, such transaction merely creating the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not withdrawn the bank is subject to the equities of the prior parties, though the paper is taken before maturity and without notice. Page 279a, No. 1142.
Under Rev. Laws 1902, c. 73, § 73, providing that to constitute notice there must have been actual knowledge of the infirmity or defect in a negotiable instrument, or knowledge of such facts that the taking of the instrument amounted to bad faith, a holder who acted in good faith, without notice of any infirmity, is a holder in due course. No. 1144.
Under Negotiable Instruments Law (Laws 1897, p. 731, c. 612), § 79, providing that where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferee obtains such title as the transferror had, an assignment of a note payable to a foreign corporation or order, without indorsement, does not make the assignee a holder in due course, as defined by Negotiable Instruments Law, §§ 2, 60, 61, 91, and 98. Page 281a, No. 1148.
Gross negligence on the part of one to whom a note is negotiated in not making inquiry as to defects suggested by the facts known to him, is evidence for which "bad faith" as used in the Negotiable Instruments Law may be inferred, but it does not of itself constitute bad faith as a matter of law. One who takes in payment the private note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularity that may exist in its execution. Page 274a, No. 1139.
A recital in a promissory note which destroys its negotiability must be of a kind that in some respects qualifies or makes uncertain or conditional the promise; and a note which shows upon its face that it is secured by a trust deed is negotiable, and an innocent holder of such note will not be held to have notice that the notes were originally given to the maker's agent to raise money for the use of the maker and were by him converted to his own use. Page 277a, No. 1140.
The treasurer of a corporation, authorized to pledge its credit and sign notes on its behalf, who indorsed on a note the name of the corporation, followed by his own name, bound the corporation, though the office of the treasurer was not designated in the indorsement. The variance between the name of a corporation "L. Rosenberg, Incorporated," and the indorsement of a note, "Louis Rosenberg, Inc.," is harmless and does not defeat the intention of the officer of the corporation indorsing the note on its behalf to bind it. Page 283a, No. 1150.
Where a note was executed in Michigan and sent to Wisconsin for the

Digitized by Google

BILLS AND NOTES — Continued.

signature of a person, who signed his name on the back and by direction of the maker sent it to the payee in Michigan, it was a Michigan contract, and the liability of the person who signed his name on the back thereof was governed by the law of that State. Page 286a, No. 1152.

The fact that the circumstances surrounding the purchase of a negotiable promissory note before its maturity were sufficient to excite the suspicion of a prudent man concerning the instrument will not defeat a recovery. The proof must establish that the purchase was made with knowledge of the facts concerning the execution of the note, that the plaintiff believed that there was a defense to the instrument, or that he acted in bad faith or dishonestly. No. 1147.

Under the common-law rule in Kentucky, one signing his name to a blank note and delivering it to another to be used to raise money is responsible for whatever sum the latter inserts in the body of the note. No. 1169.

Though the assignment of a note for value and without notice is without due course, the defenses to which it is subject are only those existing at the time of the transfer, and not those which possibly may at some future time exist, so that the note not having been given for advances to be made subsequently, failure of the payee to make them will not prevent recovery by the assignee. Page 295a, No. 1171.

Where one takes the note of one of the members of partnership, indorsed by the partnership, in payment of an individual obligation or as collateral security for an individual obligation, he is charged with inquiry as to whether the member of the partnership making the note has the right to indorse the name of the partnership, and if he does not inquire and it transpires that the member had no right to so indorse the firm name, the other partner will not be liable. Page 256a.

Where the drawer of a check used the name of a payee who was an existing person, but such drawer never intended that this person should receive the check, the check is payable to a fictitious payee, and as the Negotiable Instruments Law provides that a check which is payable to a fictitious or non-existing person and

BILLS AND NOTES — Continued.

such fact is known to the drawer, is payable to bearer, such a check is payable to bearer. A bank properly charged to a depositor's account a check drawn by the depositor's employee to the order of a fictitious payee, whose name the employee had indorsed on the back of the check. Page 183a, No. 1117.

A note was made payable at the residence of the maker and at its maturity the maker was called up on the telephone by the bank to which it had been sent for collection, and was asked what he was going to do about it. He replied that he could not pay it and was informed that the note would be protested. It was held that the demand over the telephone was a sufficient presentment for payment and that the statutory right of the maker to an exhibition of the note was waived by his failure to insist upon it. Page 188a, No. 1118.

An oral contract for a real estate broker's commissions in the State of Nebraska is enforceable; nevertheless such services furnish a sufficient consideration for a promissory note. Page 196a, No. 1120.

Where several persons purchased a horse and gave their joint promissory note payable to the order of the parties from whom they purchased the horse, and the note was transferred by the payees to a bank, and the bank sued the makers, the question of the bank's good faith was one for the jury, and where it could be shown that fraudulent representations had been made as to the qualities of the horse to one or more of the makers, the defense was available to all the defendants, even though the representations had not been made to each maker individually. Page 253a, No. 1136.

A stockholder who, with other stockholders, indorsed a note to the corporation, given to raise money for the benefit of the company and the stockholders and with the understanding that all the stockholders were equally bound, was not entitled to notice of dishonor for the reason that the Negotiable Instruments Law provides that no notice of dishonor is required to charge an indorser where the instrument is made or accepted for his accommodation. Page 243a, No. 1132.

Under the Negotiable Instruments Law a person who places his signature on a negotiable instrument

Digitized by Google

BILLS AND NOTES — Continued.
otherwise than as maker, drawer, or acceptor, is deemed to be an indorser unless he clearly indicates his intention to be bound otherwise, and failure to give him notice of the non-payment and dishonor of the note discharges him. Page 248a, No. 1133.
The Negotiable Instruments Law defines a holder in due course as one who takes a negotiable instrument, complete and regular upon its face, before it is overdue and without notice of dishonor, in good faith and for value, and who at the time of transfer had no notice of any infirmity in it or defect in the title of the person negotiating it. When an action is brought and the defendant proves that the note was obtained from him by fraud the burden then shifts to the holder to show that he is a holder in due course, and whether or not he has met this burden is a question for the jury and not for the court. Page 249a, No. 1134.
The Negotiable Instruments Law provides that every holder of a negotiable instrument is prima facie a holder in due course; but when the title of any one negotiating the instrument is shown to be defective, the burden is on the holder to prove title acquired in due course. Another section provides what things constitute a defective title, and among them is a note given for an illegal consideration. It was held that a failure of consideration did not constitute a defective title so as to shift the burden of proof to the holder, the burden of showing failure of consideration and notice being upon the maker. Page 251a, No. 1135.
The negotiability of a promissory note is governed by the law of the place (State) where it is made payable. The laws of another State will be presumed to be the same as the one where the action is brought, unless they are brought to the attention of the court by the pleadings and competent proof. Page 258a.
Where one acquires a check, by indorsement, for value, in good faith and before it is overdue, and without notice of any infirmity or that payment had been stopped at the bank, he is a holder in due course. Where the check is in the hands of a holder in due course, delivery thereof by all prior parties is conclusively presumed. Page 263a.

BILLS AND NOTES — Continued.
A drawer of a check is discharged unless he is given notice of a check's dishonor, when a bank refuses payment, where the drawer had sufficient funds in the bank to meet it. This notice is required by the Negotiable Instruments Law. Page 257a.
Presentment for payment and notice of dishonor, under the Negotiable Instruments Law of Pennsylvania, are not necessary in order to charge indorsers where the instrument was made or accepted for their accommodation and they had no reason to expect that the instrument would be paid if presented; consequently, where the maker of the note is a corporation and the indorsers are officers, also directors and stockholders, of that corporation, and the money was loaned to the corporation on the strength of the individual indorsements of such officers, no presentment or notice is necessary for the reason that the instrument was executed for their accommodation. Page 197a, No. 1121.
Under the Negotiable Instruments Law the accommodation maker of a promissory note is not discharged by an agreement between the holder of the note and the co-maker, extending the time of payment, for the reason that the accommodation maker of a note is not a party secondarily liable, but primarily liable, being absolutely required to pay the note. Page 202a, No. 1123.
Where the drawer of a draft sold goods to the drawee and drew a draft payable to the order of himself and indorsed by him to a bank, and the drawee accepted the draft and was sued by the bank, the indorsee, he could not set up the defense of failure of consideration as between him and the drawer, for the reason that a defense available to the acceptor against the drawer is not available to an innocent third party, who is a holder in due course. Page 209a, No. 1126.
The Negotiable Instruments Law requires that a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay, and the courts hold that where the parties to a check reside in the same community a reasonable time for presentment ends with the next day thereafter. Page 210a, No. 1127.
Prior to the Negotiable Instruments

Digitized by Google

BILLS AND NOTES — Continued.

Act, passed in Michigan in 1905, a person holding a note as collateral security for an existing indebtedness was not a holder for value, but under the Negotiable Instruments Law, which provides that value is any consideration sufficient to support a simple contract and that an antecedent or pre-existing indebtedness constitutes value, a person holding a note as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him. Page 212a, No. 1128.

The Negotiable Instruments Law provides that presentment and notice of dishonor are necessary to charge an indorser. It also provides that the presentment and notice may be dispensed with by an express or implied waiver. Where a corporation executed a note, and the president of the corporation indorsed it individually, and before the note's maturity the corporation, the maker, went into involuntary bankruptcy and the president signed an admission of the company's inability to pay its debts and willingness to be adjudicated bankrupt, the payee can recover of the indorser, also the president of the maker, notwithstanding the failure of the payee to present the instrument for payment and to give notice of its dishonor to the indorser. Page 213a, No. 1129.

An instrument to be negotiable must be payable to order or to bearer. An accommodation indorser of a non-negotiable note is liable as guarantor to the payee, if he indorsed for the accommodation of the maker, and must pay if the maker does not. Page 214a, No. 1130.

The extension of the time of payment of another's debt constitutes a good consideration for a promissory note, and a promissory note being necessarily in writing, the statute of frauds is not involved. Page 216a, No. 1131.

Where a draft was drawn by a bank to the order of a payee, of whose existence it had no knowledge and the payee's indorsement was forged and presented to another bank for deposit and subsequently paid by the bank upon which it was drawn, the bank upon which it was drawn could recover from the bank to whom it paid the money on the theory that the bank presenting the draft for payment had no title to it for the reason that the indorsement of the payee was a forgery. The fact that this draft was payable to a person of whose existence the bank had no knowledge and the person requesting the draft never intended the payee to have it, did not make the draft payable to bearer for the reason that the drawer of the draft, a bank in this instance, did not know that the draft was payable to the fictitious payee. Page 218a.

One who acquires a negotiable instrument for a pre-existing or antecedent indebtedness is a holder for value and may recover against an accommodation party to the note, notwithstanding the fact that he knew when he took the note that such party was an accommodation party. Page 224a.

A party purchased a draft drawn by one bank on another bank which was to be placed to the credit of the payee in the bank upon which the draft was drawn, and a certificate of deposit issued to the payee; the certificate of deposit was issued, when it was discovered by the latter bank that payee's indorsement was lacking and the draft was returned to the party presenting it, the bank having stamped on the draft that "on its return properly indorsed, will be placed to credit of —— (naming payee)." The bank, which was the drawer, failed and the drawee bank was held liable on the theory that it had accepted the draft. Page 226a.

A promissory note is an unconditional promise in writing to pay a sum certain in money at a fixed or determinable future time. Page 242a.

The lessors of a hotel agreed to lease the same to one K. if H. would be some guarantor for performance of lease. L. did so. It was further agreed that the lessors should purchase the furniture of the former lessee, giving in part payment a note made by K., the new lessee, to the order of the former lessee and indorsed by L. L. was liable as indorser on this note under the Negotiable Instruments Law, which provides that a person placing his signature on a note otherwise than as maker is liable as indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, and one placing his signature on back of note, payable to a third party is liable to payee and all subsequent parties. Where indorsement is obtained by

Digitized by Google

BILLS AND NOTES — Continued.

fraudulent representations, indorser may successfully defend. Page 234a.

Where a note, secured by mortgage, to take effect immediately, is given to a dealer therein for money to be advanced subsequently, the maker is estopped to assert failure to advance the money, as against one who took the same from the payee for value and in good faith, without negligence, though the taking was without an indorsement, essential to due course; the rules of the law merchant giving way to the supreme rule of estoppel in pais. Page 295a, No. 1171.

There is a consideration for a note, though the money called therefor is not advanced at the time the note is given or at all; it, with a mortgage securing it, being delivered for money to be advanced subsequently, and the security, however, to take effect presently. Page 295a, No. 1171.

Certificates of deposit may by their terms be negotiable. No. 1173.

In an action on a check drawn by defendant and indorsed by a third person, where the uncontradicted evidence showed that the indorser obtained title to the check by fraud, his title was defective under Negotiable Instruments Law, § 94. and the burden was upon plaintiffs to prove that they or some person under whom they claimed had acquired the title as a holder in due course, under section 98. No. 1172.

Where defendant made payments on a note to L. after he had transferred the note to a bona fide holder for value before maturity, and without insisting on L.'s production thereof or some proof that he was still the holder, they were not entitled to credit for such payments as against the holder. Page 293a, No. 1167.

When payees of a note on receiving it paid a specified sum to banks, which the maker owed, there was a valuable consideration for the note, within Negotiable Instruments Law providing that an antecedent debt constitutes value. No. 1169.

The burden is on the maker of a negotiable instrument to show that a transferee before maturity had notice of a failure of consideration for the instrument when he purchased it. When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid for it without notice of the fraud. Page 293a, No. 1166.

BILLS AND NOTES — Continued.

An allegation that notice of dishonor was given to one who was present at the indorser's place of business and in his employment was a sufficient allegation of notice to the indorser. A verbal notice of dishonor to an indorser is sufficient, even though it was given to the agent of the indorser. No particular form of notice of dishonor of a negotiable note is necessary, it being sufficient that the party liable is informed of its dishonor and notified that it will be held for payment. Page 291a, No. 1160.

An order for the payment of money, addressed to no one in particular, but generally to any one for whom the maker might be employed or who owed him money, is too indefinite and uncertain to be binding on any one. Action cannot be maintained on an unaccepted order. No. 1161.

Accommodation paper has no legal inception until negotiated for value. The taking of accommodation notes, either as conditional payment on an account or as collateral security for an antecedent indebtedness, is for value, and where there is no fraudulent diversion of the notes from a restricted use imposed by the maker. Page 292a, No. 1163.

When several instalments of a note payable in instalments are overdue and unpaid the whole note is past due. Page 286a, No. 1153.

While the maker of a note is impliedly bound to reimburse one indorsing it for his accommodation for any payment the indorser may be compelled to make, he cannot sue the maker until he has made the payment. Page 287a, No. 1154.

An indorser of a promissory note complete in form when indorsed, which has been fraudulently raised after indorsement, is not liable thereon to a bona fide holder for the increased amount, although at the time of indorsing there were spaces in front of the figures and the writing which rendered forgery easy. Page 269a, No. 1137.

Where a bill of exchange is payable in France, the law of that country would determine what constitutes payment. A firm in New York drew two sets of drafts, originals and duplicates, upon a bank in Paris, the duplicates to be paid only in case the originals were unpaid. The duplicates were presented for payment and paid by the French bank, one of the indorse-

Digitized by Google

BILLS AND NOTES — Continued.
ments having been forged. The person whose name had been forged sued the bank in France, and the judgment was in favor of the bank. Subsequently an action was brought in America by the payee against the drawer of the bill and it was held that the payee could recover, the judgment in France not being a bar, because the evidence showed that the French bank was negligent and therefore not entitled to the protection of Code de Commerce, article 145. Page 159a.
There is an implied representation on the part of the drawer of a bill of exchange that he has funds in the hands of the drawee sufficient to pay the bill, and when the bill is accepted by the drawee he admits the truth of this implied representation. The Negotiable Instruments Law provides that when a bill is dishonored by non-acceptance the holder has an immediate right to recourse against the drawer and indorsers and under this law it has been held that although the bill is payable at a fixed time, it may be presented for acceptance at any time, and if the acceptance is refused or cannot be obtained, the holder may treat the bill as dishonored. Page 85a, No. 1098.
Where the maker's signature to a check was forged and the name of the payee was also forged and a check was accepted by the bank upon which it was drawn, and subsequently deposited in another bank and paid by the bank upon which it was drawn, the bank upon which it was drawn could not recover of the bank where the check was deposited upon discovery of the forgery, also held that the check was payable to a fictitious payee and therefore was payable to bearer, and the bank upon which it was drawn should not have accepted the check, a bank being supposed to know the signatures of its depositors. Page 112a, No. 1108.
A promissory note which contains a provision that it is subject to the conditions of a certain contract of even date is non-negotiable because it is not an unconditional promise or order to pay a sum certain in money, and being non-negotiable the maker may set up against the innocent holder the same defense which he could set up against the payee. Page 106a, No. 1104.
The material alteration of a note subsequent to its execution and without the consent of the makers and indorsers renders the note invalid in the hands of the original payee, and in the hands of a bona fide holder. The erasure of a name of one of the joint makers, after delivery of the note and without knowledge of the other joint makers, is a material alteration. Page 97a, No. 1102.
Bad faith is the test and not knowledge of circumstances which would arouse the suspicions of a holder, in determining whether or not the plaintiff, in an action upon a promissory note, is an innocent holder. Page 101a, No. 1103.
A note was made by defendant in favor of O to enable O to take up a forged note indorsed to plaintiff, by O, and under the Negotiable Instruments Law, which provides that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon is deemed a party thereto for value, the plaintiff could recover against the defendant, for O was liable as an indorser of the forged note, whether he knew it was forged or not and plaintiff had a right to accept defendant's note in settlement of O's liability and there was no evidence of an agreement to quash a criminal case which was pending against O for having uttered the forged note. Page 107a, No. 1105.
Notwithstanding the fact that a note was transferred in violation of a written contract by the payee, a corporation, and it came into the hands of another corporation by a subsequent assignment, the president of which latter corporation was also an officer of the payee corporation and knew of the circumstances under which the note was executed, still his knowledge would not be notice to the corporation unless it was also shown that his knowledge was acquired while acting as president of the corporation, to which the note was transferred. When the defendant proves that there was fraud in the inception of the note, the burden of proof shifts to the plaintiff to show that he is an innocent holder for value before maturity. Page 88a, No. 1099.
A check is only a provisional payment of a debt, but it becomes absolute where the authorized agent of the

Digitized by Google

BILLS AND NOTES — Continued.
creditor indorsed the creditor's name on the check and negotiated the same to a third party. Delay in the presentment of a check will relieve the drawer of liability where he has been injured by the delay and where the parties reside in the same community; twenty-four hours is considered a reasonable time within which a check should be presented for payment after its receipt. Page 111a, No. 1107.
Under the Negotiable Instruments Law one can be a holder in due course of a negotiable instrument, only where it is complete and regular upon its face, consequently a bank is not a bona fide holder of a note sent to it to meet over-drafts of the payee, who has indorsed the notes to the order of the bank, where the notes are blank as to date, time of payment and amount, and the cashier of the bank was authorized by the president of the payee corporation to fill in the blanks. Page 95a, No. 1101.
The words "president" and "trustee" after names are merely descriptio personæ, and have no force and effect and where a note is made payable to a man as president and executed by another as trustee, the transaction is one between these two individuals and the undisclosed principals of the maker of the note will not be charged with liability on the note. The undisclosed principals, however, may be charged with liability by reason of the original consideration, for the execution of the note by the principals themselves would not have abrogated the right of the other party to sue upon the original consideration, and neither would the execution of the note by their agent effect the right of the other party to sue upon the original consideration. Page 92a, No. 1100.
Where a notary uses diligence and exercises good faith in mailing a notice of protest to an indorser, the indorser will be charged with liability on the note, even though he did not receive the notice of protest until three months after it was mailed, the evidence showing that there had been proper presentment and that the indorser received his mail at a place which was one mile farther away from him than another place, which was a larger place than the one at which he received his mail. Page 109a, No. 1106.

BILLS AND NOTES — Continued.
In an action on a note, whether plaintiff was a bona fide purchaser held, under the evidence for the jury. Page 102a.
A defendant is properly indicted for obtaining money under false pretenses, where it is shown that he drew a check and delivered it to another, knowing at the time that he had no funds in the bank for the payment of such check, and knowing that it was worthless. It is false pretense for the reason that the person to whom the check is delivered, is misled by the very delivery of the check, even though the drawer makes no statements. Page 153a.
The defendants, who are indorsers upon four (4) promissory notes, negotiated with the plaintiff for the purchase of some stock and the contract for the purchase of the stock was made with one Paine. A corporation was formed to take over the stock of the other corporation, and as part payment for the stock of the corporation, notes were given which were executed by the new corporation to its own order, indorsed by it, and also by the defendants. The defendants contested their liability upon some renewal notes on the ground that they were defrauded in the purchase of this stock. Held, they were liable on the notes as indorsers. Page 120a, No. 1111.
Where the signature of a check was forged and the check was given for the payment of city assessments upon the land of certain individuals, and the bank, upon which the check was drawn, having paid the check, the bank could not recover from the defendants, whose assessments the check had paid, because the drawee of a bill of exchange is presumed to know the drawer's signature and if he accepts or pays the bills to which the drawer's name had been forged, he cannot repudiate the acceptance or recover the money. Page 149a.
Where a person has custody of certain notes, which are made payable to him and two other payees and indorsed by the three, and he wrongfully pledged them to a bank, the bank surrendering certain collateral which it held for this individual's indebtedness, and substituting the notes in place of it, the bank could recover unless the two other payees could show that the bank was not a

Digitized by Google

BILLS AND NOTES — Continued.

holder in good faith. The bank paid value for the notes because the Negotiable Instruments Law provides that a pre-existing or antecedent indebtedness constitutes value. Page 142a.

The agent cannot represent both parties to the contract. Where he has received a commission from the seller of a piece of machinery, he cannot recover on a promissory note, which was given to him as a bonus, from the purchaser of the same machinery. This note would be voidable at the option of the maker, because the consideration failed by reason of the duel capacity of the agent. Page 118a, No. 1110.

The mere possession by the holder of a note raises a presumption that he is a holder in good faith and if the defendant shows that there was fraud in the inception of the note, the burden of proof then shifts to the plaintiff to show that he is a holder in good faith; and where the judge charged the jury that the burden of proof was on the plaintiff to show that he acquired the note in the ordinary course of business and before it was due, this charge constitutes reversible error, because the plaintiff makes out a prima facie case by the introduction of the note in evidence. Page 122a, No. 1112.

Where the drawer of a draft purchased a bale of cotton of the payee of the draft, and desiring it shipped to a certain party, he made this party drawee, and the bill was transferred by the payee to a holder for value without notice, and it subsequently transpired that the bale of cotton had a lien against it under which it was attached, the holder could recover against the drawee for the reason that the acceptor and drawee could not set up the defense of failure of consideration against the holder for value in due course without notice. Page 126a, No. 1114.

Where an indorsee of a note brought action thereon against the maker on a statement of claim which did not aver that plaintiff was a bona fide holder, and affidavit of defense averring that the note was taken after notice of the payee's defective title, and that no consideration passed, was sufficient, and put plaintiff on proof of the bona fides of the transaction. 15a, No. 1086.

BILLS AND NOTES — Continued.

Where notes were executed in settlement of a claim for hides belonging to the payee, which the maker's business partner had purchased from a thief, it was held that they were based on a sufficient consideration, and the defendant having voluntarily executed the notes after being given ample time to consider the matter and after consulting with his attorney, the notes were not executed under duress. 14a, No. 1085.

Section 116 of the Negotiable Instruments Law provides that an indorser without qualification warrants to all subsequent holders that the instrument is valid and subsisting at the time of his indorsement, therefore an indorser cannot escape liability on the ground that the note was void because of usury between the original parties. 19a, No. 1088.

The negotiability of a promissory note is not destroyed by a provision therein "that the makers and indorsers thereof severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice," when by its terms it is made payable on or before a day named, according to a decision of the highest court of North Dakota. 1a, No. 1080.

Where it is shown that the consideration for a note wholly failed, and that there was fraud and misrepresentation on the part of the payees, inducing the makers to execute the note and the note was transferred to a bank, who extended credit in another bank to the indorsers, it was held that the burden of proof was upon the bank, the plaintiff in the action, to show that the credit which had been thus extended was used by the indorsers, and if it had not been used by the indorsers the bank would not be a holder for value. 7a, No. 1082.

A note to be negotiable must be payable to order or bearer under the Negotiable Instruments Law, and where a note is payable to "The M. Ryan estate only," it is a non-negotiable note; but having been transferred by the administratrix of the estate to a bank, and the bank suing the maker, the bank was entitled to recover, having introduced the note in evidence on the trial, there being no evidence introduced by the defendant, for the reason that a party has a right to sue even if he has only the naked legal title,

Digitized by Google

BILLS AND NOTES — Continued.
although the money when collected may belong to some one else. 25a.
Where a draft was transferred from one bank to another in settlement of a day's balances, and it was known by the bank to whom it was transferred that the bank transferring the draft was in failing condition, the bank acquiring the draft before maturity and in due course, it was held that the bank could recover against the indorser who had deposited the draft with the bank which transferred it, as it was not proved that the bank acquiring the draft acted in bad faith. Bad faith is the test and not a suspicion of a defect in title, although guilty knowledge or wilful ignorance amount to bad faith. 35a, No. 1089.
The acceptor of a draft sought to escape liability by showing that the firm which drew the draft had been dissolved and that it had notified the payee that it would honor the draft of the partnership and by reason of the dissolution that the partnership was not longer in existence and therefore the acceptor was not liable, but it was held that actual knowledge of the dissolution by the payee must be shown, the payee having had other drafts drawn by the same firm paid by the same acceptors. It was further held that the acceptor of a bill of exchange becomes primarily liable for its payment, and is to be considered the principal debtor, even though the acceptance is for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it. 11a, No. 1084.
The president and director of a trust company, who is also a director of a bank, induced other directors of a bank to execute a note on the pretense that the bank was temporarily in need of funds, and expressly agreeing that the note was not to be discounted until the signatures of the other directors of the bank had been attached to the note. Notwithstanding the agreement, he caused the note to be discounted by the trust company without procuring the additional signatures, and without consulting the board of directors of the company. His knowledge that the note was fraudulently negotiated could not be attributed to the company of which he was the president and a director. 39a, No. 1090.
A purchaser is not a bona fide purchaser who has a general notice of a failure of consideration or fraud in the inception of a note or knowledge of circumstances which should induce him to investigate, although the purchaser may be a mala fide purchaser, even though he did not participate in the fraud or the failure of consideration. It is not necessary for the holder to have notice of the particular defect, a general notice of defect will make him a mala fide holder. 41a, No. 1091.
Where the check of a corporation is given in payment of the personal indebtedness of an officer of the corporation, the transferee receives it with a notice that the check is being unlawfully used. The transferee is put upon inquiry, but he is entitled to protection of he did not make the inquiry, if it is shown that the inquiry which he would have pursued would have resulted in his obtaining no information that the check was unlawfully used. He is, however, charged with notice of facts which might have been ascertained, not only in regard to the particular defect which the appearance of the instrument should lead him to investigate, but also with any other defect which he might have discovered as a result of his investigation. 43a.
The liability of the indorser of a check is conditioned on its prompt presentment for payment on the part of the holder and notice of non-payment, and if the holder is negligent in presenting the check for payment, the indorser would be released even though a prompt presentment would have been unavailing, unless it appears that the indorser knew at the time when he passed the check that there were or would be no funds in the bank to meet it. 55a.
If the purchaser of a note has notice of facts which tend to show fraud in the inception of the note and the purchaser purposely refrains from making inquiries for fear he will learn of the invalidity of the note, he cannot claim to be a bona fide holder. 64a.
If the holder of a check negligently fails to present the same for payment until after the bank upon which it is drawn closes its doors, and the drawer had sufficient funds at the bank to pay the check at the time it was drawn, the drawer would be released; but the drawer is not

Digitized by Google

BILLS AND NOTES — Continued.

released if the holder used due diligence in presenting the check for payment. 70a, No. 1092.

In an action on notes given in consideration of stock purchased from the company's president's agent, which notes were payable to the company and indorsed by the company to the plaintiff in the action, who was also a director of the company, and which action was defended by the makers on the ground that there were misrepresentations as to the value of the stock, does not necessarily constitute the holder a holder in bad faith. The test is, did he act in bad faith? 72a, No. 1093.

When a note and a mortgage securing it are transferred to an innocent holder for value, such holder has a lien upon the real estate which is free from all latent equities of persons who are strangers to the title. No. 1096.

Where an individual pays the note of another by mistake, the debt was extinguished and the note being transferred to the individual paying it by the indorsement of the cashier of the bank to which the note was sent for collection, is not entitled under this indorsement to sue as a holder and having without authority paid another's debt, he is not entitled to subrogation. No. 1095.

BILL OF EXCHANGE:

There is an implied representation on the part of the drawer of a bill of exchange that he has funds in the hands of the drawee sufficient to pay the bill, and when the bill is accepted by the drawee he admits the truth of this implied representation. The Negotiable Instruments Law provides that when a bill is dishonored by non-acceptance the holder has an immediate right to recourse against the drawer and indorsers and under this law it has been held that although the bill is payable at a fixed time, it may be presented by acceptance at any time, and if the acceptance is refused or cannot be obtained, the holder may treat the bill as dishonored. Page 85a, No. 1098.

Where the drawer of a draft purchased a bale of cotton of the payee of the draft, and desiring it shipped to a certain party, he made this party drawee, and the bill was transferred by the payee to a holder for value without notice, and it subsequently transpired that the bale of cotton had a lien against it under which it was attached, the holder could recover against the drawee for the reason that the acceptor and drawee could not set up the defense of failure of consideration against the holder for value in due course without notice. Page 126a, No. 1114.

BILL OF EXCHANGE — Continued.

Where a bill of exchange is payable in France, the law of that country would determine what constitutes payment. A firm in New York drew two sets of drafts, originals and duplicates, upon a bank in Paris, the duplicates to be paid only in case the originals were unpaid. The duplicates were presented for payment and paid by the French bank, one of the indorsements having been forged. The person whose name had been forged sued the bank in France, and the judgment was in favor of the bank. Subsequently an action was brought in America by the payee against the drawer of the bill and it was held that the payee could recover, the judgment in France not being a bar, because the evidence showed that the French bank was negligent and therefore not entitled to the protection of Code de Commerce, article 145. Page 159a.

Where the drawer of a draft sold goods to the drawee and drew a draft payable to the order of himself and indorsed by him to a bank and the drawee accepted the draft and was sued by the bank, the indorsee, he could not set up the defense of failure of consideration as between him and the drawer, for the reason that a defense available to the acceptor against the drawer is not available to an innocent third party, who is a holder in due course. Page 209a, No. 1126.

Where a draft at sixty days sight is drawn against a consignment of wheat, the fact that it has a bill of lading for the wheat attached and contains the words, "to be surrendered upon payment of this bill before maturity under discount on or before the arrival of vessel," will not change the time of maturity, and a custom or usage cannot be permitted to be shown in order to fix a different maturity from that plainly appearing on the face of a draft. 58a.

Digitized by Google

BILLS OF LADING:

Where a draft at sixty days sight is drawn against a consignment of wheat, the fact that it has a bill of lading for the wheat attached, and contain the words, "to be surrendered upon payment of this bill before maturity under discount on or before the arrival of vessel," will not change the time of maturity, and a custom or usage cannot be permitted to be shown in order to fix a different maturity from that plainly appearing on the face of the draft. 58a.

The Factor's Act, in force in the State of New York, provides that if a factor is entrusted with a bill of lading he shall be deemed the true owner of the merchandise to the extent of giving validity to any contract or any part with another person for the sale or disposition of the whole or any part of the merchandise for any money advanced upon the faith of such bill of lading, and where it is doubtful as to whether the factor was acting as a commission merchant or as a middleman, buying from the manufacturer and selling to the consumer, a bank which loaned money to the factor upon the faith of the possession by the factor of a bill of lading, could keep the money collected from the customers of the factor as against the company which sold the material to the factors. Page 206a, No. 1125.

"BONA FIDE HOLDER:"

A bank, which discounts paper for a depositor and gives him credit for the proceeds, is not a "bona fide holder" for value, so as to be protected against infirmities in the paper unless some other consideration passes, such transaction merely creating the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues and the deposit is not withdrawn the bank is subject to the equities of the prior parties, though the paper is taken before maturity and without notice. Page 279a, No. 1142.

Notwithstanding the fact that a note was transferred in violation of a written contract by the payee, a corporation, and it came into the hands of another corporation by a subsequent assignment, the president of which latter corporation was also an officer of the payee corporation and knew of the circumstances

BONA FIDE HOLDER — Continued.

under which the note was executed, still his knowledge would not be notice to the corporation unless it was also shown that his knowledge was acquired while acting as president of the corporation, to which the note was transferred. When the defendant proves that there was fraud in the inception of the note, the burden of proof shifts to the plaintiff to show that he is an innocent holder for value before maturity. Page 88a, No. 1099.

Where a person has custody of certain notes, which are made payable to him and two other payees and indorsed by the three, and he wrongfully pledged them to a bank, the bank surrendering certain collateral which it held for this individual's indebtedness, and substituting the notes in place of it, the bank could recover unless two other payees could show that the bank was not a holder in good faith. The bank paid value for the notes because the Negotiable Instruments Law provides that a pre-existing or antecedent indebtedness constitutes value. Page 142a.

In an action on notes given in consideration of stock purchased from the company's president's agent, which notes were payable to the company and indorsed by the company to the plaintiff in the action, who was also a director in the company, and which action was defended by the makers on the ground that there were misrepresentations as to the value of the stock, does not necessarily constitute the holder a holder in bad faith. The test is did he act in bad faith. 72a, No. 1093.

If the purchaser of a note has notice of facts which tend to show fraud in the inception of the note and the purchaser purposely refrains from making inquiries for fear he will learn of the invalidity of the note, he cannot claim to be a bona fide holder. 64a.

Where an indorsee of a note brought action thereon against the maker on a statement of claim which did not aver that plaintiff was a bona fide holder, and affidavit of defense averring that the note was taken after notice of payee's defective title, and that no consideration passed, was sufficient, and put plaintiff on proof of the bona fides of the transaction. 15a, No. 1086.

Where a draft was transferred from

Digitized by Google

BONA FIDE HOLDER—Continued.

one bank to another in settlement of a day's balances, and it was known by the bank to whom it was transferred that the bank transferring the draft was in failing condition, the bank acquiring the draft before maturity and in due course, it was held that the bank could recover against the indorser who had deposited the draft with the bank which transferred it, as it was not proved that the bank acquiring the draft acted in bad faith. Bad faith is the test and not a suspicion of a defect in title, although guilty knowledge or wilful ignorance amount to bad faith. 35a, No. 1089.

Where several persons purchased a horse and gave their joint promissory note payable to the order of the parties from whom they purchased the horse and the note was transferred by the payees to a bank, and the bank sued the makers, the question of the bank's good faith was one for the jury, and where it could be shown that fraudulent representations had been made as to the qualities of the horse to one or more of the makers, the defense was available to all the defendants, even though the representations had not been made to each maker individually. Page 253a, No. 1136.

One who acquires a negotiable instrument for a pre-existing or antecedent indebtedness is a holder for value and may recover against an accommodation party to the note, notwithstanding the fact that he knew when he took the note that such party was an accommodation party. Page 224a.

BONA FIDE PURCHASERS:

Where the check of a corporation is given in payment of the personal indebtedness of an officer of the corporation, the transferee receives it with a notice that the check is being unlawfully used. The transferee is put upon inquiry, but he is entitled to protection if he did not make the inquiry. if it is shown that the inquiry which he would have pursued would have resulted in his obtaining no information that the check was unlawfully used. He is, however, charged with notice of facts which might have been ascertained, not only in regard to the particular defect which the appearance of the instrument should lead him to investigate. but also with any

BONA FIDE PURCHASERS—Cont'd.

other defect which he might have discovered as a result of his investigation. 43a.

A purchaser is not a bona fide purchaser who has a general notice of a failure of consideration or fraud in the inception of a note or knowledge of circumstances which should induce him to investigate, although the purchaser may be a mala fide purchaser, even though he did not participate in the fraud or the failure of consideration. It is not necessary for the holder to have notice of the particular defect, a general notice of defect will make him a mala fide holder. 41a, No. 1091.

In an action on a note, whether plaintiff was a bona fide purchaser held, under the evidence for the jury. Page 102a.

Under the Negotiable Instruments Law one can be a holder in due course of a negotiable instrument only where it is complete and regular upon its face, consequently a bank is not a bona fide holder of a note sent to it to meet over-drafts of the payee, who has indorsed the notes to the order of the bank, where the notes are blank as to date, time of payment and amount, and the cashier of the bank was authorized by the president of the payee corporation to fill in the blanks. Page 95a, No. 1101.

The mere possession by the holder of a note raises a presumption that he is a holder in good faith and if the defendant shows that there was fraud in the inception of the note, the burden of proof then shifts to the plaintiff to show that he is a holder in good faith; and where the judge charged the jury that the burden of proof was on the plaintiff to show that he acquired the note in the ordinary course of business and before it was due, this charge constituted reversible error, because the plaintiff makes out a prima facie case by the introduction of the note in evidence. Page 122a, No. 1112.

Under Rev. Laws 1902, c. 73, § 73, providing that to constitute notice there must have been actual knowledge of the infirmity or defect in a negotiable instrument, or knowledge of such facts that the taking of the instrument amounted to bad faith, a holder who acted in good faith, without notice of any infirmity, is a holder in due course. No. 1144.

A member of a commercial partner-

Digitized by Google

BONA FIDE PURCHASER — Cont'd.
ship may borrow money for the use of the partnership and issue its note, without knowledge of his associates, who will be bound. Private limitations upon the authority of a member of a commercial partnership to borrow money for the use of the partnership and issue its note cannot affect the holder who takes the note without knowledge of them. No. 1144.
The fact that the circumstances surrounding the purchase of a negotiable promissory note before its maturity were sufficient to excite the suspicion of a prudent man concerning the instrument will not defeat a recovery. The proof must establish that the purchase was made with knowledge of the facts concerning the execution of the note, that the plaintiff believed that there was a defense to the instrument, or that he acted in bad faith or dishonesty. No. 1147.
A recital in a promissory note which destroys its negotiability must be of a kind that in some respects qualifies or makes uncertain or conditional the promise; and a note which shows upon its face that it is secured by a trust deed is negotiable, and an innocent holder of such note will not be held to have notice that the notes were originally given to the maker's agent to raise money for the use of the maker and were by him converted to his own use. Page 277a, No. 1140.
Gross negligence on the part of one to whom a note is negotiated in not making inquiry as to defects suggested by the facts known to him, is evidence for which "bad faith" as used in the Negotiable Instruments Law, may be inferred, but it does not of itself constitute bad faith as a matter of law. One who takes in payment the private note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularity that may exist in its execution. Page 274a, No. 1139.

BREACH:
Where a party buys an engine to furnish power for a cotton ginnery, and the seller knows that the ginnery will remain idle unless the engine is promptly delivered, and the engine is not promptly delivered, the purchaser may counterclaim as damages to the suit of the seller for the purchase price of the engine, the value of the use of the plant for the period the plant remained idle and for which the non-delivery of the engine is responsible. Damages cannot be speculative or contingent. Page 173a.

BREACH — Continued.

BROKER'S COMMISSIONS:
An oral contract for a real estate broker's commissions in the State of Nebraska is unenforceable; nevertheless such services furnish a sufficient consideration for a promissory note. Page 196a, No. 1120.

BURDEN OF PROOF.
Notwithstanding the fact that a note was transferred in violation of a written contract by the payee, a corporation, and it came into the hands of another corporation by a subsequent assignment, the president of which latter corporation was also an officer of the payee corporation and knew of the circumstances under which the note was executed, still his knowledge would not be notice of the corporation unless it was also shown that his knowledge was acquired while acting as president of the corporation, to which the note was transferred. When the defendant proves that there was fraud in the inception of the note, the burden of proof shifts to the plaintiff to show that he is an innocent holder for value before maturity. Page 88a, No. 1099.
The mere possession by the holder of a note raises a presumption that he is a holder in good faith and if the defendant shows that there was fraud in the inception of the note, the burden of proof then shifts to the plaintiff to show that he is a holder in good faith; and where the judge charged the jury that the burden of proof was on the plaintiff to show that he acquired the note in the ordinary course of business and before it was due, this charge constituted reversible error, because the plaintiff makes out a prima facie case by the introduction of the note in evidence. Page 122a, No. 1112.
In an action on a check drawn by defendant and indorsed by a third person, where the uncontradicted evidence showed that the indorser obtained title to the check by fraud, his title was defective under Negotiable Instruments Law, § 94, and the burden was upon plaintiffs to

Digitized by Google

BURDEN OF PROOF — Continued.
prove that they or some person under whom they claimed had acquired the title as a holder in due course, under section 98. No. 1172.
The burden is on the maker of a negotiable instrument to show that a transferree before maturity had notice of a failure of consideration for the instrument when he purchased it. When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid for it without notice of the fraud. Page 293a, No. 1166.
The Negotiable Instruments Law defines a holder in due caurse as one who takes a negotiable instrument, complete and regular upon its face, before it is overdue, and without notice of dishonor, in good faith and for value, and who at the time of transfer has no notice of any infirmity in it or defect in the title of the person negotiating it. When an action is brought and the defendant proves that the note was obtained from him by fraud the burden then shifts to the holder to show that he is a holder in due course, and whether or not he has met this burden is a question for the jury and not for the court. Page 249a, No. 1134.
The Negotiable Instruments Law provides that every holder of a negotiable instrument is prima facie a holder in due course; but when the title of any one negotiating the instrument is shown to be defective, the burden is on the holder to prove title acquired in due course. Another section provides what things constitute a defective title, and among them is a note given for an illegal consideration. It was held that a failure of consideration did not constitute a defective title so as to shift the burden of proof to the holder, the burden of showing failure of consideration and notice being upon the maker. Page 251a, No. 1135.

CERTIFICATION OF CHECK:
The certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. The transfer of a certified check is an assignment of money to meet it, and the bank making the certification is liable therefor to the holder. The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay it, and a bank that has received a certified check for deposit and has credited the depositor with the amount of it is a bona fide holder and may enforce payment of it, notwithstanding it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor. Page 288a, No. 1155.

CERTIFICATES OF DEPOSIT:
Certificates of deposit may by their terms be negotiable. No. 1173.

CHECKS:
In an action on a check drawn by defendant and indorsed by a third person, where the uncontradicted evidence showed that the indorser obtained title to the check by fraud, his title was defective under Negotiable Instruments Law, § 94, and the burden was upon plaintiffs to prove that they or some person under whom they claimed had acquired the title as a holder in due course, under section 98. No. 1172.
When defendant paid a check drawn on it, marking it paid, crediting it to the indorsee's agent's account, and charging it to the drawer's account, the transaction was irrevocably closed; defendant becoming indebted to the agent and being powerless to subsequently charge the check back. Page 289a, No. 1159.
Leaving blank the name of the payee of a check gives to any bona fide holder for value implied authority to fill blank with his own name or that of a third person, and so, likewise, where all that was required to make a check out of a forged instrument delivered by defendant in payment was the insertion of the name of the payee, the delivery constituted the transferee defendant's agent with authority to fill in the blank with his own name, and a claim that the instrument was not a check or an instrument for the payment of money within the meaning of Penal Code, when passed by defendant is without merit. Where the name of the payee is left blank in

Digitized by Google

CHECKS — Continued.

a check, the effect of such paper until the name of the payee is inserted pursuant to authority conferred on the receiver by its delivery for value is that it is payable to the bearer, and passes from hand to hand by mere delivery. Page 272a. No. 1138.

A defendant is properly indicted for obtaining money under false pretenses, where it is shown that he drew a check and delivered it to another, knowing at the time that he had no funds in the bank for the payment of such check, and knowing that it was worthless. It is false pretense for the reason that the person to whom the check is delivered, is misled by the very delivery of the check, even though the drawer makes no statements. Page 153a.

It is not negligence for a bank to pay a check which was written on the blank form of another bank, nor is it negligence for the bank to pay a check, the body of which is not in the handwriting of the maker. The bank is only required to know the signature of the drawer. Page 116a, No. 1109.

Where the maker's signature to a check was forged and the name of the payee was also forged and a check was accepted by the bank upon which it was drawn, and subsequently deposited in another bank and paid by the bank upon which it was drawn, the bank upon which it was drawn could not recover of the bank where the check was deposited upon discovery of the forgery; also held that the check was payable to a fictitious payee and therefore was payable to bearer, and the bank upon which it was drawn should not have accepted the check, a bank being supposed to know the signature of its depositors. Page 112a, No. 1108.

A check is only a provisional payment of a debt, but it becomes absolute where the authorized agent of the creditor indorsed the creditor's name on the check and negotiated the same to a third party. Delay in the presentment of a check will relieve the drawer of liability where he has been injured by the delay and where the parties reside in the same community; twenty-four hours is considered a reasonable time within which a check should be presented for payment after its receipt. Page 111a, No. 1107.

CHECKS — Continued.

Where a signature of a check was forged and the check was given for the payment of city assessments upon the land of certain individuals, and the bank, upon which the check was drawn, having paid the check, the bank could not recover from the defendants, whose assessments the check had paid, because the drawee of a bill of exchange is presumed to know the drawer's signature and if he accepts or pays the bills to which the drawer's name had been forged, he cannot repudiate the acceptance or recover the money. Page 149a.

The plaintiffs forwarded to their agent a check payable to one of their customers. The agent forged the customer's name and deposited the check in the bank to the credit of L. & Co. The agent was indebted to the plaintiffs, and upon being asked to pay his indebtedness, transferred the amount on deposit to the credit of L. & Company, to the credit of the plaintiffs. The forged check was paid by the bank upon which it was drawn and charged to the account of the plaintiffs, and the plaintiffs sued the bank but were unable to recover for the reason that the money realized upon the forged check had been returned to them. Page 127a, No. 1115.

A signature of an estate, which was a depositor in a trust company, was forged on a check, drawn on the trust company and payable to one of the distributees of the estate whose signature was also forged. The check was paid by the bank and the trust company upon discovering the forgery, sued the bank to recover the money it had paid upon these forged checks. The Appellate Division of the State of New York held that it could not be recovered for the reason that he should know the signatures of its depositors, and that the checks being payable to a fictitious payee, were payable to bearer under the Negotiable Instruments Law for the reason that the maker knew that it was payable to the order of a fictitious payee. If the trust company had detected the forgery of the drawer neither the trust company nor the bank would have suffered loss. 21a.

The president of a national bank had written to a State bank obligating his bank to pay all checks of a corporation not aggregating more than

Digitized by Google

CHECKS — Continued.

$500 weekly, and the national bank afterwards telegraphed that it would protect the corporation's checks for $5,000 weekly in excess of present guaranty, and later that the State bank would pay checks in excess of guaranty drawn during the current week. The bank cashed some of the checks, and before the check could be paid by the national bank, the national bank failed, and the drawer of the checks also failed, it was held that the State bank had no right of action against the national bank on the guaranty, as the president of the national bank had exceeded his powers, and the State bank was chargeable with notice that the credit and resources of the national bank were being unlawfully used. 29a.

Where the check of a corporation is given in payment of the personal indebtedness of an officer of the corporation, the transferee receives it with a notice that the check is being unlawfully used. The transferee is put upon inquiry, but he is entitled to protection if he did not make the inquiry if it is shown that the inquiry which he would have pursued would have resulted in his obtaining no information of facts which might have been ascertained, not only in regard to the particular defect which the appearance of the instrument should lead him to investigate, but also with any other defect which he might have discovered as a result of his investigation. 43a.

If the holder of a check negligently fails to present the same for payment until after the bank upon which it is drawn closes its doors, and the drawer had sufficient funds at the bank to pay the check at the time it was drawn, the drawer would be released; but the drawer is not released if the holder used due diligence in presenting the check for payment. 70a, No. 1092.

The liability of the indorser of a check is conditioned on its prompt presentment for payment on the part of the holder and notice of nonpayment, and if the holder is negligent in presenting the check for payment, the indorser would be released, even though a prompt presentment would have been unavailing, unless it appears that the indorser knew at the time when he passed the check that there were

CHECKS — Continued.

or would be no funds in the bank to meet it. 55a.

The Negotiable Instruments Law requires that a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay, and the courts hold that where the parties to a check reside in the same community, a reasonable time for presentment ends with the next day thereafter. Page 210a, No. 1127.

Where a party gives his agent a note for collection and the debtor gives a check in payment of the note to the agent, and the agent presents the check to the bank upon which it is drawn for payment and indorses the name of the principal, to whom the check is payable, and the bank pays the check, the principal may recover from the bank, because an agent with authority to collect a note does not also have authority to indorse the name of her principal to the check. Page 204a, No. 1124.

A drawer of a check is discharged unless he is given notice of a check's dishonor, when a bank refuses payment, where the drawer had sufficient funds in the bank to meet it. This notice is required by the Negotiable Instruments Law. Page 257a.

Where one acquires a check, by indorsement, for value, in good faith and before it is overue, and without notice of any infirmity or that payment had been stopped at the bank, he is a holder in due course. Where the check is in the hands of a holder in due course, delivery thereof by all prior parties is conclusively presumed. Page 263a.

Where the drawer of a check used the name of a payee who was an existing person, but such drawer never intended that this person should receive the check, the check is payable to a fictitious payee, and as the Negotiable Instruments Law provides that a check which is payable to a fictitious or non-existing person and such fact is known to the drawer, is payable to bearer, such a check is payable to bearer. A bank properly charged to a depositor's account a check drawn by the depositor's employee to the order of a fictitious payee, whose name the employee had indorsed on the back of the check. Page 183a, No. 1117.

Digitized by Google

CLEARING HOUSE BANKS:

A member of the New York Clearing House held as security for the amount of a non-member certain bills receivable and cash. The non-member went into the hands of a receiver on a certain day and the business day following the member paid certain checks of the non-member and sold or collected to reimburse itself the collateral. The rules of the New York Clearing House provide that a member bank cannot cease to pay the obligations of a non-member bank except upon notice to the other banks and this notice does not take effect until the exchanges of the following morning. Consequently, although the member bank paid these checks drawn upon the non-member bank the day after the non-member bank went into the hands of the superintendent of banks and with knowledge of the insolvency of the non-member bank, the receiver of the non-member bank could not recover from the member bank the value of the securities which it had sold to reimburse itself for the checks paid, drawn upon the non-member bank. Page 130a, No. 1116.

CONDITIONAL DEPOSITS:

T. deposited money to S. Co.'s credit in defendant bank conditionally. Though the condition never arose, the company drew a check for the amount in favor of plaintiff, and a bank officer who did not know of the condition credited plaintiff with the amount in a pass book issued to it. Before any account was opened on the books it was discovered that deposit was not subject to check, and the S. Co. was notified within twenty-four hours, the check was returned, and defendant refused to transfer the account. It does not appear that the plaintiff was a bona fide purchaser of the deposit or that its position was changed between the issuance of the pass book and the notice of the S. Co. Held, that defendant was not bound by the credit indicated by the pass book. A bank with which money was deposited to the credit of a third party to be paid on condition imposed for the depositor's benefit could not pay any part of it on the depositor's check until the condition was met. No. 1145.

CONSIDERATION:

When payees of a note on receiving it, paid a specified sum to banks, which

CONSIDERATION — Continued.

the maker owed there was a valuable consideration for the note, within Negotiable Instruments Law, providing that an antecedent debt constitutes value. No. 1169.

There is a consideration for a note, though the money called therefor is not advanced at the time the note is given or at all; it, with a mortgage securing it, being delivered for money to be advanced subsequently, and the security, however, to take effect presently. Page 295a, No. 1171.

Where the drawer of a draft purchased a bale of cotton of the payee of the draft, and desiring it shipped to a certain party, he made this party drawee, and the bill was transferred by the payee to a holder for value without notice, and it subsequently transpired that the bale of cotton had a lien against it under which it was attached, the holder could recover against the drawee for the reason that the acceptor and drawee could not set upon the defense of failure of consideration against the holder for value in due course without notice. Page 126a, No. 1114.

Where notes were executed in settlement of a claim for hides belonging to the payee, which the maker's business partner had purchased from a thief, it was held that they were based on a sufficient consideration, and the defendant having voluntarily executed the notes after being given ample time to consider the matter and after consulting with his attorney, the notes were not executed under duress. 14a, No. 1085.

The extension of the time of payment of another's debt constitutes a good consideration for a promissory note, and a promissory note being necessarily in writing, the statute of frauds is not involved. Page 216a, No. 1131.

An oral contract for a real estate broker's commissions in the State of Nebraska is unenforceable; nevertheless such services furnish a sufficient consideration for a promissory note. Page 196a, No. 1120.

CONTRACTS:

A contract for the sale of goods, wares, and merchandise of the value of more than fifty dollars is within the statute of frauds, and unless it is in writing it cannot be proved. Where a contract of sale is made and no time is specified for delivery, de-

Digitized by Google

CONTRACTS — Continued.

livery must be made within a reasonable time. Page 264a.

Mutual assent is necessary to the formation of every contract, and any mistake of the parties by which one of the contracting parties has in mind one thing as the subject-matter of the contract, and the other party has in mind something entirely different, and where the terms of the contract are such that it will mean either the one or the other, there is no meeting of the minds of the contracting parties, and therefore no contract. 80a.

Contracts which provided for a succession of acts involving special knowledge and skill will not be specifically enforced by a court of equity. Where one party to a contract cannot be compelled to specifically perform his side of the contract, he cannot bring an action to compel specific performance on the part of the other party to the contract. Page 133a.

Special damages may be recovered for breach of a contract of sale for delay in delivering within time required by the contract which the purchaser had with another where these damages are the natural and direct result of the breach, and the circumstances were within the knowledge of the seller, although not stated in the formal contract, and where the amount of such damages is ascertainable with reasonable certainty. Page 178a.

Where a party buys an engine to furnish power for a cotton ginnery, and the seller knows that the ginnery will remain idle unless the engine is promptly delivered, and the engine is not promptly delivered, the purchaser may counterclaim as damages to the suit of the seller for the purchase price of the engine, the value of the use of the plant for the period the plant remained idle and for which the non-delivery of the engine is responsible. Damages cannot be speculative or contingent. Page 173a.

CORPORATIONS:

The treasurer of a corporation, authorized to pledge its credit and sign notes on its behalf, who indorsed on a note the name of the corporation, followed by his own name, bound the corporation, though the office of the treasurer was not designated in the indorsement. The variance between the name of a corporation "L. Rosenberg, Incorporated," and the indorsement of a note, "Louis Rosenberg, Inc.," is harmless, and does not defeat the intention of the officer of the corporation, indorsing the note on its behalf to bind it. Page 283a, No. 1150.

CORPORATIONS — Continued.

The corporation cannot retain the proceeds of a purchase for in consideration of which it gave its promissory note and set up the defense of ultra vires to defeat the recovery of the holder of the promissory note against it. 10a, No. 1083.

The president and director of a trust company, who is also a director of a bank, induced other directors of a bank to execute a note on the pretense that the bank was temporarily in need of funds, and expressly agreeing that the note was not to be discounted until the signatures of the other directors of the bank had been attached to the note. Notwithstanding the agreement, he caused the note to be discounted by the trust company without procuring the additional signatures, and without consulting the board of directors of the company. His knowledge that the note was fraudulently negotiated could not be attributed to the company of which he was the president and director. 39a, No. 1090.

Where the check of a corporation is given in payment of the personal indebtedness of an officer of the corporation, the transferee receives it with a notice that the check is being unlawfully used. The transferee is put upon inquiry, but he is entitled to protection if he did not make the inquiry, if it is shown that the inquiry which he would have pursued would have resulted in his obtaining no information that the check was unlawfully used. He is, however, charged with notice of facts which might have been ascertained, not only in regard to the particular defect which the appearance of the instrument should lead him to investigate, but also with any other defect which he might have discovered as a result of his investigation. 43a.

The defendants, who are indorsers upon four (4) promissory notes, negotiated with the plaintiff for the purchase of some stock and the contract for the purchase of the stock was made with one Paine. A corporation was formed to take over

Digitized by Google

CORPORATIONS — Continued.
the stock of the other corporation, and as part payment for the stock of the corporation, notes were given which were executed by the new corporation to his own order, indorsed by it, and also by the defendants. The defendants contested their liability upon some renewal notes on the ground that they were defrauded in the purchase of this stock. Held, they were liable on the notes as indorsers. Page 120a, No. 1111.

DAMAGES:
Special damages may be recovered for breach of a contract of sale for delay in delivering within time required by the contract which the purchaser had with another where these damages are the natural and direct result of the breach, and the circumstances were within the knowledge of the seller, although not stated in the formal contract, and where the amount of such damages is ascertainable with reasonable certainty. Page 178a.
Where a party buys an engine to furnish power for a cotton ginnery, and the seller knows that the ginnery will remain idle unless the engine is promptly delivered, and the engine is not promptly delivered, the purchaser may counterclaim as damages to the suit of the seller for the purchase price of the engine, the value of the use of the plant for the period the plant remained idle and for which the nondelivery of the engine is responsible. Damages cannot be speculative or contingent. Page 173a.

DEFENSES:
Though the assignment of a note for value and without notice is without due course, the defenses to which it is subject are only those existing at the time of the transfer, and not those which possibly may at some future time exist, so that the note having been given for advance to be made subsequently, failure of the payee to make them will not prevent recovery by the assignee. Page 295a, No. 1171.
Where several persons purchased a horse and gave their joint promissory note payable to the order of the parties from whom they purchased the horse and the note was transferred by the payees to a bank, and the bank sued the makers, the question of the bank's good faith

DEFENSES — Continued.
was one for the jury, and where it could be shown that fraudulent representations had been made as to the qualities of the horse to one or more of the makers, the defense was available to all the defendants, even though the representations had not been made to each maker individually. Page 253a, No. 1136.

DELIVERY:
A contract for the sale of goods, wares, and merchandise of the value of more than fifty dollars is within the statute of frauds, and unless it is in writing it cannot be proved. Where a contract of sale is made and no time is specified for delivery, delivery must be made within a reasonable time. Page 264a.

DEPOSITS:
A bank cannot charge to a depositor's account a check upon which the name of the payee has been forged; but it is the duty of the depositor to promptly notify the bank of a forgery after its discovery by him, and in case he does not, he cannot recover from the bank if the bank charges to his account the forged check. Page 198a, No. 1122.
Where a check for a ward's share of an estate was payable to both the ward and the guardian, and the bank where it was deposited knew that the money was the ward's, it cannot be relieved from liability for applying the proceeds of the check to payment of a debt due it from the guardian individually. No. 1165.
Where a depositor does not know that a bank is insolvent, he having heard rumors to that effect, goes to the bank and is assured by the bank's officers that the bank is solvent and he withdraws his money from the bank, the money so paid him is not impressed with a trust in favor of the other creditors of the bank and where with this money he purchases a New York draft and the bank where he had his deposit subsequently goes into the hands of receivers, he is entitled to be subrogated to the rights of the bank upon which the draft was drawn in the collateral, which is in the hands of the receivers of the insolvent bank. Page 124a, No. 1113.
Notwithstanding the fact that the rules and regulations of a savings bank, which are printed upon the pass book of the depositor and to which the depositor agrees, require

Digitized by Google

DEPOSITS — Continued.

that a depositor must give notice of a lost or stolen book and if the bank pays out the money upon the presentation of the deposit book, it will not be liable, the Supreme Court of Ohio held that the bank must exercise good faith and use reasonable care in making such payment, otherwise it would be liable to the depositor. Page 97a.

DISSOLUTION:

A partnership agreement provided that the partnership was to continue for five (5) years and in case any partner desired to withdraw, he should give at least ten (10) days' notice and the remaining partners would return the amount he had paid for his interest. It was held that the provision for the continuance of the partnership for five (5) years was a limitation fixed in case one of the partners did not withdraw, but if one of the partners elected to withdraw, the partnership was thereby dissolved and the withdrawing partner had a right to an accounting. Page 155a.

The acceptor of a draft sought to escape liability by showing that the firm which drew the draft had been dissolved, and that it had notified the payee that it would honor the draft of the partnership, and by reason of the dissolution that the partnership was no longer in existence, and therefore the acceptor was not liable, but it was held that actual knowledge of the dissolution by the payee must be shown, the payee having had other drafts drawn by the same firm paid by the same acceptors. It was further held that the acceptor of a bill of exchange becomes primarily liable for its payment, and is to be considered the principal debtor, even though the acceptance is for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it. 11a, No. 1084.

DISTRIBUTION OF ASSETS.

In a distribution of the funds of an insolvent bank all general depositors should share equally. A deposit of money in a bank by one who sustains fiduciary relations to the funds, and who deposits the money for the benefit of another with the knowledge of the banker, was not entitled to any priority at the distribution of the assets on the

DISTRIBUTION OF ASSETS — Cont'd.

bank's insolvency, where there was no understanding that the deposit should be treated as a special deposit. No. 1164.

DIVIDENDS:

A note pledged by a third party as security for the payment of a debt stands in the position of a surety for the payment of the principal debt, and funds paid upon the pledged note will be applied upon the debt secured. No. 1168.

DRAFT:

Where the drawer of a draft sold goods to the drawee and drew a draft payable to the order of himself and indorsed by him to a bank and the drawee accepted the draft and was sued by the bank, the indorsee, he could not set up the defense of failure of consideration as between him and the drawer, for the reason that a defense available to the acceptor against the drawer is not available to an innocent third party who is a holder in due course. Page 209a, No. 1126.

A party purchased a draft drawn by one bank on another bank which was to be placed to the credit of the payee in the bank upon which the draft was drawn, and a certificate of deposit issued to the payee; the certificate of deposit was issued, when it was discovered by the latter bank that payee's indorsement was lacking and the draft was returned to the party presenting it, the bank having stamped on the draft that "on its return properly indorsed, will be placed to credit of —— (naming payee)." The bank, which was the drawee, failed and the drawee bank was held liable on the theory that it had accepted the draft. Page 226a.

Where a draft was drawn by a bank to the order of a payee, of whose existence it had no knowledge and the payee's indorsement was forged and presented to another bank for deposit and subsequently paid by the bank upon which it was drawn, the bank upon which it was drawn could recover from the bank to whom it paid the money on the theory that the bank presenting the draft for payment had no title to it for the reason that the indorsement of the payee was a forgery. The fact that this draft was payable to a person

Digitized by Google

DRAFT — Continued.
of whose existence the bank had no knowledge and the person requesting the draft never intended the payee to have it, did not make the draft payable to bearer for the reason that the drawer of the draft, a bank in this instance, did not know that the draft was payable to the fictitious payee. Page 218a.
Where the drawer of a draft had agreed with the indorser of a draft that he would extend credit to the drawee provided the indorser would guarantee the draft by his indorsement and the draft was subsequently drawn payable to the order of the drawer and accepted by the drawee, having been previously indorsed by the indorser before its delivery, the indorser is liable to the drawer of the draft, because parol evidence may be introduced to show what is the respective liability as between indorsers, and after acceptance the draft is virtually a promissory note made by the acceptor and payable to the payee. Page 191a. No. 1119.
Where a draft at sixty days sight is drawn against a consignment of wheat, the fact that it has a bill of lading for the wheat attached, and contain the words, "to be surrendered upon payment of this bill before maturity under discount on or before the arrival of vessel," will not change the time of maturity, and a custom or usage cannot be permitted to be shown in order to fix a different maturity from that plainly appearing on the face of a draft. 58a.
The acceptor of a draft sought to escape liability by showing that the firm which drew the draft had been dissolved, and that it had notified the payee that it would honor the draft of the partnership, and by reason of the dissolution that the partnership was no longer in existence, and therefore the acceptor was not liable, but it was held that actual knowledge of the dissolution by the payee must be shown, the payee having had other drafts drawn by the same firm paid by the same acceptors. It was further held that the acceptor of a bill of exchange becomes primarily liable for its payment, and it is to be considered the principal debtor, even though the acceptance is for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it. 11a, No. 1084.

DRAWEE:
Where the drawer of a draft sold goods to the drawee and drew a draft payable to the order of himself and indorsed by him to a bank, and the drawee accepted the draft and was sued by the bank, the indorsee, he could not set up the defense of failure of consideration as between him and the drawer, for the reason that a defense available to the acceptor against the drawer is not available to an innocent third party who is a holder in due course. Page 209a, No. 1126.

DRAWEE'S LIABILITY:
Where a signature of a check was forged and the check was given for the payment of city assessments upon the land of certain individuals, and the bank, upon which the check was drawn, having paid the check, the bank could not recover from the defendants, whose assessments the check had paid, because the drawee of a bill of exchange is presumed to know the drawer's signature and if he accepts or pays the bills to which the drawer's name had been forged, he cannot repudiate the acceptance or recover the money. Page 149a.

DRAWER:
A party purchased a draft drawn by one bank on another bank which was to be placed to the credit of the payee in the bank upon which the draft was drawn, and a certificate of deposit issued to the payee; the certificate of deposit was issued, when it was discovered by the latter bank that payee's indorsement was lacking and the draft was returned to the party presenting it, the bank having stamped on the draft that "on its return properly indorsed, will be placed to the credit of —— (naming payee)." The bank, which was the drawer, failed and the drawee bank was held liable on the theory that it had accepted the draft. Page 226a.

DURESS:
Where notes were executed in settlement of a claim for hides belonging to the payee, which the maker's business partner had purchased from a thief, it was held that they were based on a sufficient consideration, and the defendant having voluntarily executed the notes after being given ample time to consider the

Digitized by Google

DURESS — Continued.

matter and after consulting with his attorney, the notes were not executed under duress. 14a, No. 1085.

ENTIRETY OF CONTRACTS:

Contracts which provided for a succession of acts involving special knowledge and skill will not be specifically enforced by a court of equity. Where one party to a contract cannot be compelled to specifically perform his side of the contract, he cannot bring an action to compel specific performance on the part of the other party to the contract. Page 133a.

ESTOPPEL:

T. deposited money to S. Co.'s credit in defendant bank conditionally. Though the condition never arose, the company drew a check for the amount in favor of plaintiff, and a bank officer who did not know of the condition credited plaintiff with the amount in a pass book issued to it. Before any account was opened on the books, it was discovered that deposit was not subject to check, and the S. Co. was notified within twenty-four hours, the check was returned, and defendant refused to transfer the account. It does not appear that the plaintiff was a bona fide purchaser of the deposit or that its position was changed between the issuance of the pass book and the notice of the S. Co. Held, that defendant was not bound by the credit indicated by the pass book. A bank with which money was deposited to the credit of a third party to be paid on condition imposed for the depositor's benefit could not pay any part of it on the depositor's check until the condition was met. No. 1145.

ESTOPPEL TO ASSERT DEFENSE:

Where a note, secured by mortgage, to take effect immediately, is given to a dealer therein for money to be advanced subsequently, the maker is estopped to assert failure to advance the money, as against one who took the same from the payee for value and in good faith, without negligence, though the taking was without an indorsement, essential to due course; the rules of the law merchant giving way to the supreme rule of estoppel in pais. Page 295a, No. 1171.

EVIDENCE:

Where the evidence is convincing to the mind of the court that in the execution of a note and mortgage there has been fraud on one side and mistake on the other, the court will in its equitable jurisdiction reform the instruments. No. 1097.

EXHIBITION OF PAPER:

A note was made payable at the residence of the maker and at its maturity the maker was called up on the telephone by the bank to which it had been sent for collection, and was asked what he was going to do about it. He replied that he could not pay it and was informed that the note would be protested. It was held that the demand over the telephone was a sufficient presentment for payment and that the statutory right of the maker to an exhibition of the note was waived by his failure to insist upon it. Page 188a, No. 1118.

EXTENSION OF TIME:

The extension of the time of payment of another's debt constitutes a good consideration for a promissory note, and a promissory note being necessarily in writing, the statute of frauds is not involved. Page 216a, No. 1131.

The negotiability of a promissory note is not destroyed by a provision therein "that the makers and indorsers thereof severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice," when by its terms it is made payable on or before a day named, according to a decision of the highest court of North Dakota. 1a, No. 1080.

FACTORS:

The Factor's Act, in force in the State of New York, provides that if a factor is entrusted with a bill of lading he shall be deemed the true owner of the merchandise to the extent of giving validity to any contract made by with another person for the sale or disposition of the whole or any part of the merchandise for any money advanced upon the faith of such bill of lading, and where it is doubtful as to whether the factor was acting as a commission merchant or as a middleman, buying from the manufacturer and

Digitized by Google

FACTORS — Continued.

selling to the consumer, a bank which loaned money to the factor upon the faith of the possession by the factor of a bill of lading, could keep the money collected from the customers of the factor as against the company which sold the material to the factors. Page 206a, No. 1125.

FAILURE OF CONSIDERATION:

The burden is on the maker of a negotiable instrument to show that a transferee before maturity had notice of a failure of consideration for the instrument when he purchased it. When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid for it without notice of the fraud. Page 293a, No. 1166.

FALSE PRETENSES:

A defendant is properly indicted for obtaining money under false pretenses, where it is shown that he drew a check and delivered it to another, knowing at the time that he had no funds in the bank for the payment of such check, and knowing that it was worthless. It is false pretense for the reason that the person to whom the check is delivered, is misled by the very delivery of the check, even though the drawer makes no statements. Page 153a.

FICTITIOUS OR NON-EXISTING PAYEE:

Where a draft was drawn by a bank to the order of a payee, of whose existence it had no knowledge and the payee's indorsement was forged and presented to another bank for deposit and subsequently paid by the bank upon which it was drawn, the bank upon which it was drawn could recover from the bank to whom it paid the money on the theory that the bank presenting the draft for payment had no title to it for the reason that the indorsement of the payee was a forgery. The fact that this draft was payable to a person of whose existence the bank had no knowledge and the person requesting the draft never intended the payee to have it, did not make the draft payable to bearer for the reason that the drawer of the draft, a bank in this instance, did not know that the draft was payable to the fictitious payee. Page 218a.

FICTITIOUS PAYEE:

A signature of an estate, which was a depositor in a trust company, was forged on a check, drawn on the trust company and payable to one of the distributees of the estate, whose signature was also forged. The check was paid by the bank, and the trust company upon discovering the forgery sued the bank to recover the money it had paid upon these forged checks. The Appellate Division of the State of New York held that it could not be recovered for the reason that it should know the signatures of its depositors, and that the checks being payable to a fictitious payee, were also payable to bearer under the Negotiable Instruments Law for the reason that the maker knew that it was payable to the order of a fictitious payee. If the trust company had detected the forgery of the drawer, neither the trust company nor the bank would have suffered loss. 21a.

Where an employee of a railroad company erased the name of the real payee of a warrant and substituted the name of another payee, the name of the other payee in the forged instrument was either a fictitious party unknown to the drawer or real entity, and where the warrant was cashed by a Denver bank and forwarded to a Detroit bank, which was one of the general depositors of the railroad, for payment, and the Detroit bank paid the warrant, the burden of proof is on the Detroit bank to show either that the payee was a fictitious party and known to be fictitious by the maker, or that the money was paid to the party mentioned in the warrant of such a person was real entity. 3a, No. 1081.

Where the drawer of a check used the name of a payee who was an existing person, but such drawer never intended that this person should receive the check, the check is payable to a fictitious payee, and as the Negotiable Instruments Law provides that a check which is payable to a fictitious or non-existing person and such fact is known to the drawer, is payable to bearer, such a check is payable to bearer. A bank properly charged to a depositor's account a check drawn by the depositor's employee to the order of a fictitious payee, whose name the employee had indorsed on the back of the check. Page 183a, No. 1117.

Digitized by Google

FOREIGN CORPORATIONS:

Unless a foreign corporation, doing business in New York, has obtained the license required by General Corporation Law (Laws 1892, p. 1805, c. 687), § 15, before making a contract within the state, neither the corporation nor its assignee can maintain an action thereon in New York. Page 281a, No. 1148.

FOREIGN LAW:

Where a bill of exchange is payable in France, the law of the country would determine what constitutes payment. A firm in New York drew two sets of drafts, originals and duplicates, upon a bank in Paris, the duplicates to be paid only in case the originals were unpaid. The duplicates were presented for payment and paid by the French bank, one of the indorsements having been forged. The person whose name had been forged sued the bank of France, and the judgment was in favor of the bank. Subsequently an action was brought in America by the payee against the drawer of the bill and it was held that the payee could recover, the judgment in France not being a bar, because the evidence showed that the French bank was negligent and therefore not entitled to the protection of Code de Commerce, article 145. Page 159a.

FORGED INDORSEMENTS:

Where a bill of exchange is payable in France, the law of that country would determine what constitutes payment. A firm in New York drew two sets of drafts, originals and duplicates, upon a bank in Paris, the duplicates to be paid only in case the originals were unpaid. The duplicates were presented for payment and paid by the French bank, one of the indorsements having been forged. The person whose name had been forged sued the bank in France, and the judgment was in favor of the bank. Subsequently an action was brought in America by the payee against the drawer of the bill and it was held that the payee could recover, the judgment in France not being a bar, because the evidence showed that the French bank was negligent and therefore not entitled to the protection of Code de Commerce, article 145. Page 159a.

FORGERY:

Where the maker's signature to a check was forged and the name of the payee was also forged and a check was accepted by the bank upon which it was drawn, and subsequently deposited in another bank and paid by the bank upon which it was drawn, the bank upon which it was drawn could not recover of the bank where the check was deposited upon discovery of the forgery, also held that the check was payable to a fictitious payee and therefore was payable to bearer, and the bank upon which it was drawn should have accepted the check, a bank being supposed to know the signatures of its depositors. Page 112a, No. 1108.

Where a signature of a check was forged and the check was given for the payment of city assessments upon the land of certain individuals, and the bank, upon which the check was drawn, having paid the check, the bank could not recover from the defendants, whose assessments the check had paid, because the drawee of a bill of exchange is presumed to know the drawer's signature and if he accepts or pays the bills to which the drawer's name had been forged, he cannot repudiate the acceptance or recover the money. Page 149a.

The plaintiffs forwarded to their agent a check payable to one of their customers. The agent forged the customer's name and deposited the check in the bank to the credit of L. & Co. The agent was indebted to the plaintiffs, and upon being asked to pay his indebtedness transferred the amount on deposit to the credit of L. & Company, to the credit of the plaintiffs. The forged check was paid by the bank upon which it was drawn and charged to the account of the plaintiffs, and the plaintiffs sued the bank but were unable to recover for the reason that the money realized upon the forged check had been returned to them. Page 127a, No. 1115.

A bank cannot charge to a depositor's account a check upon which the name of the payee has been forged; but it is the duty of the depositor to promptly notify the bank of a forgery after its discovery by him, and in case he does not, he cannot recover from the bank if the bank charges to his account the forged check. Page 198a, No. 1122.

Where the drawer of a check used the

Digitized by Google

FORGERY — Continued.

name of a payee who was an existing person, but such drawer never intended that this person should receive the check, the check is payable to a fictitious payee, and as the Negotiable Instruments Law provides that a check which is payable to a fictitious or non-existing person and such fact is known to the drawer, is payable to bearer, such a check is payable to bearer. A bank properly charged to a depositor's account a check drawn by the depositor's employee to the order of a fictitious payee, whose name the employee had indorsed on the back of the check. Page 183a, No. 1117.

Where a draft was drawn by a bank to the order of a payee, of whose existence it had no knowledge and the payee's indorsement was forged and presented to another bank for deposit and subsequently paid by the bank upon which it was drawn, the bank upon which it was drawn could recover from the bank to whom it paid the money on the theory that the bank presenting the draft for payment had no title to it for the reason that the indorsement of the payee was a forgery. The fact that this draft was payable to a person of whose existence the bank had no knowledge and the person requesting the draft never intended the payee to have it, did not make the draft payable to bearer for the reason that the drawer of the draft, a bank in this instance, did not know that the draft was payable to the fictitious payee. Page 218a.

Where an employee of a railroad company erased the name of the real payee of a warrant and substituted the name of another payee, the name of the other payee in the forged instrument was either a fictitious party unknown to the drawer or real entity, and where the warrant was cashed by a Denver bank and forwarded to a Detroit bank, which was one of the general depositors of the railroad, for payment, and the Detroit bank paid the warrant, the burden of proof is on the Detroit bank to show either that the payee was a fictitious party and known to be fictitious by the maker, or that the money was paid to the party mentioned in the warrant if such a person was real entity. 3a, No. 1081.

A signature of an estate, which was a depositor in a trust company, was forged on a check, drawn on the

FORGERY — Continued.

trust company and payable to one of the distributees of the estate, whose signature was also forged. The check was paid by the bank, and the trust company upon discovering the forgery sued the bank to recover the money it had paid upon these forged checks. The Appellate Division of the State of New York held that it could not be recovered for the reason that it should know the signatures of its depositors, and that the checks being payable to a fictitious payee were payable to bearer under the Negotiable Instruments Law for the reason that the maker knew that it was payable to the order of the fictitious payee. If the trust company had detected the forgery of the drawer, neither the trust company nor the bank would have suffered loss. 21a.

An indorser of a promissory note complete in form when indorsed, which has been fraudulently raised after indorsement, is not liable thereon to a bona fide holder for the increased amount, although at the time of endorsing there were spaces in front of the figures and the writing which rendered forgery easy. Page 269a, No. 1137.

Leaving blank the name of the payee of a check gives to any bona fide holder for value implied authority to fill blank with his own name or that of a third person, and so, likewise, where all that was required to make a check out of a forged instrument delivered by defendant in payment was the insertion of the name of the payee, the delivery constituted the transferee defendant's agent with authority to fill in the blank with his own name, and a claim that the instrument was not a check or an instrument for the payment of money within the meaning of Penal Code, when passed by defendant is without merit. Where the name of the payee is left blank in a check, the effect of such paper until the name of the payee is inserted pursuant to authority conferred on the receiver by its delivery for value is that it is payable to the bearer, and passes from hand to hand by mere delivery. Page 272a, No. 1138.

FRAUD:

The burden is on the maker of a negotiable instrument to show that a transferee before maturity had notice of a failure of consideration

Digitized by Google

FRAUD — Continued.

for the instrument when he purchased it. When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid for it without notice of the fraud. Page 293a, No. 1166.

Where the evidence is convincing to the mind of the court that in the execution of a note and mortgage there has been fraud on one side and mistake on the other, the court will, in its equitable jurisdiction, reform the instruments. No. 1097.

If the purchaser of a note has notice of facts which tend to show fraud in the inception of the note and the purchaser purposely refrains from making inquiries for fear he will learn of the invalidity of the note he cannot claim to be a bona fide holder. 64a.

The president and director of a trust company, who is also a director of a bank, induced other directors of a bank to execute a note on the pretense that the bank was temporarily in need of funds, and expressly agreeing that the note was not to be discounted until the signatures of the other directors of the bank had been attached to the note. Notwithstanding the agreement, he caused the note to be discounted by the trust company without procuring the additional signatures, and without consulting the board of directors of the company. His knowledge that the note was fraudulently negotiated could not be attributed to the company of which he was the president and a director. 39a, No. 1090.

The mere possession by the holder of a note raises a presumption that he is a holder in good faith and if the defendant shows that there was fraud in the inception of the note, the burden of proof then shifts to the plaintiff to show that he is a holder in good faith and where the judge charged the jury that the burden of proof was on the plaintiff to show that he acquired the note in the ordinary course of business and before it was due, this charge constitutes reversible error, because the plaintiff makes out a prima facie case by the introduction of the note in evidence. Page 122a, No. 1112.

The defendants, who are indorsers upon four (4) promissory notes,

FRAUD — Continued.

negotiated with the plaintiff for the purchase of some stock and the contract for the purchase of the stock was made with one Paine. A corporation was formed to take over the stock of the other corporation, and as part payment for the stock of the corporation, notes were given which were executed by the new corporation to his own order, indorsed by it, and also by the defendants. The defendants contested their liability upon some renewal notes on the ground that they were defrauded in the purchase of this stock. Held, they were liable on the note as indorsers. Page 120a, No. 1111.

If the sale of a horse was induced by fraud, the sale may be rescinded by restoring the horse, if the buyer acts within a reasonable time, and notwithstanding the fact that the horse is worth what the buyer paid. The buyer is entitled to a horse worth what the seller represented him to be worth. Page 171a.

FRAUDULENT REPRESENTATIONS:

The lessors of a hotel agreed to lease the same to one K. if H. would be some guarantor for performance of lease. L. did so. It was further agreed that the lessors should purchase the furniture of the former lessee, giving in part payment a note made by K., the new lessee, to the order of the former lessee and indorsed by L. L. was liable as indorser on this note under the Negotiable Instruments Law, which provides that a person placing his signature on a note otherwise than as maker is liable as indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, and one placing his signature on back of note, payable to a third party, is liable to payee and all subsequent parties. Where indorsement is obtained by fraudulent representations, indorser may successfully defend. Page 234a.

"GENERAL DEPOSIT:"

A general deposit is where the bank is given custody of the moneys deposited with the intention expressed or implied that the bank is not required to return the identical money, but only its equivalent the legal title to the money in such cases passing to the bank. A special deposit is one where the bank merely assumes charge or custody of the

Digitized by Google

"GENERAL DEPOSIT" — Continued.

property without authority to use it, the depositor being entitled to receive the identical thing deposited in which case the title remains with the depositor, and if the subject be money, the bank has no right to mingle it with other funds. In the absence of proof to the contrary, a deposit in a bank is presumed to be general, and it devolves upon the party claiming the contrary to show that it was received by the bank with an express or clearly implied agreement that it should be kept separate from the other funds of the bank and the identical money or property be returned to the depositor. No. 1164.

GIFTS:

A depositor in a savings bank changed the deposit standing in her name so as to make it payable to herself or another, her daughter, or survivor. The change was made under the depositor's written direction to the bank to add the name of the daughter as "owner and creditor" of all moneys deposited under the account. Subsequently thereto the depositor made a will disposing of her savings bank deposit and giving it to her daughter. Held, that the daughter was a joint owner of the deposit, and the depositor's disposition of the deposit by will did not destroy the daughter's rights. No. 1158.

A depositor in a savings bank changed the deposit standing in her name so as to make it payable to herself or another, her daughter, or survivor. The change was made under the depositor's written direction to the bank to add the name of her daughter as "owner and creditor" of all moneys deposited under the account. Subsequently thereto the depositor made a will disposing of her savings bank deposit and giving it to her daughter. Held, that the daughter was a joint owner of the deposit, and the depositors disposition of the deposit by will did not destroy the daughter's rights. No. 1157.

To constitute a gift the donor must renounce all claim or interest in the subject of the gift and there must be delivery. Where a depositor deposited money in a bank to the credit of herself and another, and it was shown on the trial that she had retained control of the deposit and kept the bank book, this did

GIFT — Continued.

not prove a gift, or a joint tenancy, it being also proved that the account stood in the joint names of the depositor and another so that the other party might act as agent for the depositor in relation to this fund. 17a, No. 1087.

HOLDER IN DUE COURSE:

The Negotiable Instruments Law provides that every holder of a negotiable instrument is prima facie a holder in due course; but when the title of any one negotiating the instrument is shown to be defective, the burden is on the holder to prove title acquired in due course. Another section provides what things constitute a defective title, and among them is a note given for an illegal consideration. It was held that a failure of consideration did not constitute a defective title so as to shift the burden of proof to the holder, the burden of showing failure of consideration and notice being upon the maker. Page 251a, No. 1135.

The Negotiable Instruments Law defines a holder in due course as one who takes a negotiable instrument, complete and regular upon its face, before it is overdue and without notice of dishonor, in good faith and for value, and who at the time of transfer had no notice of any infirmity in it or defect in the title of the person negotiating it. When an action is brought and the defendant proves that the note was obtained from him by fraud the burden then shifts to the holder to show that he is a holder in due course, and whether or not he has met this burden is a question for the jury and not for the court. Page 249a, No. 1134.

Where one acquires a check, by indorsement, for value, in good faith and before it is overdue, and without notice of any infirmity or that payment had been stopped at the bank, he is a holder in due course. Where the check is in the hands of a holder in due course, delivery thereof by all prior parties is conclusively presumed. Page 263a.

Prior to the Negotiable Instruments Act, passed in Michigan in 1905, a person holding a note as collateral security for an existing indebtedness was not a holder for value, but under the Negotiable Instruments Law, which provides that value is

Digitized by Google

HOLDER IN DUE COURSE — Cont'd.
any consideration sufficient to support a simple contract and that an antecedent or pre-existing indebtedness constitutes value, a person holding a note as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him. Page 212a, No. 1128.
Under Negotiable Instruments Law (Laws 1897, p. 731, c. 612), § 79, providing that where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferee obtains such title as the transferror had, an assignment of a note payable to a foreign corporation or order, without indorsement, does not make the assignee a holder in due course, as defined by Negotiable Instruments Law, §§ 2, 60, 61, 91, and 98. Page 281a, No. 1148.

HOLDER FOR VALUE:
One who acquires a negotiable instrument for a pre-existing or antecedent indebtedness is a holder for value and may recover against an accommodation party to the note, notwithstanding the fact that he knew when he took the note that such party was an accommodation party. Page 224a.
Prior to the Negotiable Instruments Act, passed in Michigan in 1905, a person holding a note as collateral security for an existing indebtedness was not a holder for value, but under the Negotiable Instruments Law, which provides that value is any consideration sufficient to support a simple contract and that an antecedent or pre-existing indebtedness constitutes value, a person holding a note as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him. Page 212a, No. 1128.
Where the drawer of a draft purchased a bale of cotton of the payee of the draft, and desiring it shipped to a certain party, he made this party drawee, and the bill was transferred by payee to a holder for value without notice, and it subsequently transpired that the bale of cotton had a lien against it under which it was attached, the holder could recover against the drawee for the reason that the acceptor and drawee could not set upon the defense of failure of consideration against the holder for value in due course without notice. Page 126a, No. 1114.
Bad faith is the test of and not knowledge of circumstances which would arouse the suspicions of the holder, in determining whether or not the plaintiff, in an action upon a promissory note, is an innocent holder. Page 101a, No. 1103.
Where it is shown that the consideration for a note wholly failed, and that there was fraud and misrepresentation on the part of the payees, inducing the makers to execute the note, and the note was transferred to a bank, who extended credit in another bank to the indorsers, it was held that the burden of proof was upon the bank, the plaintiff in the action, to show that the credit which had been thus extended was used by the indorsers, and if it had not been used by the indorsers the bank would not be a holder for value. 7a, No. 1082.

HOLDER FOR VALUE — Continued.

INDORSEE:
A purchaser is not a bona fide purchaser who has a general notice of a failure of consideration or fraud in the inception of a note or knowledge of circumstances which should induce him to investigate, although the purchaser may be a mala fide purchaser, even though he did not participate in the fraud or the failure of consideration. It is not necessary for the holder to have notice of the particular defect, a general notice of defect will make him a mala fide holder. 41a, No. 1091.

INDORSER:
Presentment for payment and notice of dishonor, under the Negotiable Instruments Law of Pennsylvania, are not necessary in order to charge indorsers where the instrument was made or accepted for their accommodation and they had no reason to expect that the instrument would be paid if presented; consequently, where the maker of the note is a corporation, and the indorsers are officers, also directors and stockholders, of that corporation, and the money was loaned to the corporation on the strength of the individual indorsements of such officers, no presentment or notice is necessary for the reason that the instrument was executed for their accommodation. Page 197a, No. 1121.
The Negotiable Instruments Law provides that presentment and notice of dishonor are necessary to charge an indorser. It also provides that the presentment and notice may be

Digitized by Google

INDORSER — Continued.

dispensed with by an express or implied waiver. Where a corporation executed a note and the president of the corporation indorsed it individually and before the note's maturity, the corporation, the maker, went into involuntary bankruptcy and the president signed an admission of the company's inability to pay its debts and willingness to be adjudicated bankrupt, the payee can recover of the indorser, also the president of the maker, notwithstanding the failure of the payee to present the instrument for payment and to give notice of its dishonor to the indorser. Page 213a, No. 1129.

The lessors of a hotel agreed to lease the same to one K. if H. would be some guarantor for performance of lease. L. did so. It was further agreed that the lessors should purchase the furniture of the former lessee, giving in part payment a note made by K., the new lessee, to the order of the former lessee and indorsed by L. L. was liable as indorser on this note under the Negotiable Instruments Law, which provides that a person placing his signature on a note otherwise than as maker is liable as indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, and one placing his signature on back of note, payable to a third party, is liable to payee and all subsequent parties. Where indorsement is obtained by fraudulent representations indorser may successfully defend. Page 234a.

Under the Negotiable Instruments Law a person who places his signature on a negotiable instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser unless he clearly indicates his intention to be bound otherwise, and failure to give him notice of the nonpayment and dishonor of the note discharges him. Page 248a, No. 1133.

A stockholder who, with other stockholders, indorsed a note of the corporation, given to raise money for the benefit of the company and the stockholders, and with the understanding that all the stockholders were equally bound, was not entitled to notice of dishonor for the reason that the Negotiable Instruments Law provides that no notice of dishonor is required to charge an indorser where the instrument is made or accepted for his accommodation. Page 243a, No. 1132.

INDORSER'S LIABILITY:

The liability of the indorser of a check is conditional on its prompt presentment for payment on the part of the holder and notice of nonpayment, and if the holder is negligent in presenting the check for payment, the indorser would be released even though a prompt presentment would have been unavailing, unless it appears that the indorser knew at the time when he passed the check that there were or would be no funds in the bank to meet it. 55a.

Section 116 of the Negotiable Instruments Law provides that an indorser without qualification warrants to all subsequent holders that the instrument is valid and subsisting at the time of his indorsement, therefore an indorser cannot escape liability on the ground that the note was void because of usury between the original parties. 19a, No. 1088.

INDORSEMENT:

The treasurer of a corporation, authorized to pledge its credit and sign notes on its behalf, who indorsed on a note the name of the corporation, follows by his own name, bound the corporation, though the office of the treasurer was not designated in the indorsement. The variance between the name of a corporation "L. Rosenberg, Incorporated," and the indorsement of a note, "Louis Rosenberg, Inc.," is harmless, and does not defeat the intention of the officer of the corporation, indorsing the note on its behalf to bind it. Page 283a, No. 1150.

Where a party gives his agent a note for collection and the debtor gives a check in payment of the note to the agent, and the agent presents the check to the bank upon which it is drawn for payment and indorses the name of the principal, to whom the check is payable, and the bank pays the check, the principal may recover from the bank, because an agent with authority to collect a note does not also have authority to indorse the name of her principal to the check. Page 204a, No. 1124.

INSOLVENCY:

Where a depositor does not know that a bank is insolvent, he having heard rumors to that effect, goes to the bank and is assured by the bank's officers that the bank is solvent and he withdraws his money

Digitized by Google

INSOLVENCY — Continued.

from the bank, the money so paid him is not impressed with a trust in favor of the other creditors of the bank and where with this money he purchases a New York draft and the bank where he had his deposit subsequently goes into the hands of receivers, he is entitled to be subrogated to the rights of the bank upon which the draft was drawn in the collateral, which is in the hands of the receivers of the insolvent bank. Page 124a, No. 1113.

A member of the New York Clearing House held as security for the account of a non-member certain bills receivable and cash. The non-member went into the hands of a receiver on a certain day and the business day following the member paid certain checks of the non-member and sold or collected to reimburse itself the collateral. The rules of the New York Clearing House provide that a member bank cannot cease to pay the obligations of a non-member bank except upon notice to the other banks and this notice does not take effect until the exchanges of the following morning. Consequently, although the member bank paid these checks drawn upon the non-member bank the day after the non-member bank went into the hands of the Superintendent of Banks and with knowledge of the insolvency of the non-member bank, the receiver of the non-member bank could not recover from the member bank the value of the securities which it had sold to reimburse itself for the checks paid, drawn upon the non-member bank. Page 130a, No. 1116.

In a distribution of the funds of an insolvent bank all general depositors should share equally. A deposit of money in a bank by one who sustains fiduciary relations to the funds, and who deposits the money for the benefit of another with the knowledge of the banker, was not entitled to any priority at the distribution of the assets on the bank's insolvency, where there was no understanding that the deposit should be treated as a special deposit. No. 1164.

If a person deposits in a bank for his credit a check, and it is presently treated between such person and such bank as money, the former obtaining credit upon which he may, at his pleasure, draw for money, section 4541, St. 1898, is satisfied, as regards a deposit of money. No. 1146.

IRREGULAR INDORSER:

An instrument to be negotiable must be payable to order or to bearer. An accommodation indorser of a non-negotiable note is liable as guarantor to the payee, if he indorsed for the accommodation of the maker and must pay, if the maker does not. Page 214a, No. 1130.

Where the drawer of a draft had agreed with the indorser of a draft that he would extend credit to the drawee provided the indorser would guarantee the draft by his indorsement and the draft was subsequently drawn payable to the order of the drawer and accepted by the drawee, having been previously indorsed by the indorser before its delivery, the indorser is liable to the drawer of the draft, because parol evidence may be introduced to show what is the respective liability as between indorsers and after acceptance the draft is virtually a promissory note made by the acceptor and payable to the payee. Page 191a, No. 1119.

JOINT ACCOUNTS:

To constitute a gift the donor must renounce all claim or interest in the subject of the gift and there must be a delivery. Where a depositor deposited money in a bank to the credit of herself and another, and it was shown on the trial that she had retained control of the deposit and kept the bank book, this did not prove a gift, or a joint tenancy, it being also proved that the account stood in the joint names of the depositor and another so that the other party might act as agent for the depositor in relation to this fund. 17a, No. 1087.

JUDGMENTS:

Where a bill of exchange is payable in France, the law of that country would determine what constitutes payment. A firm in New York drew two sets of drafts, originals and duplicates, upon a bank in Paris, the duplicates to be paid only in case the originals were unpaid. The duplicates were presented for payment and paid by the French bank, one of the indorsements having been forged. The person whose name had been forged sued the bank in France, and the judgment was in favor of the bank. Subsequently an action was brought in America by the payee against the drawer of the bill and it was held that the payee could recover, the judgment in France not being a bar, because the

Digitized by Google

JUDGMENTS — Continued.
evidence showed that the French bank was negligent and therefore not entitled to the protection of Code de Commerce, article 145. Page 159a.

JURISDICTION:
Equitable jurisdictions to establish lost instrument may be invoked respecting negotiable instruments. No. 1173.

JURY QUESTION:
In an action on a note, whether plaintiff was a bona fide purchaser held, under the evidence for the jury. Page 102a.

LEGAL INCEPTION:
Accommodation paper has no legal inception until negotiated for value. The taking of accommodation notes, either as conditional payment on an account or as collateral security for an antecedent indebtedness, is for value, where there is no fraudulent diversion of the notes from a restricted use imposed by the maker. Page 292a, No. 1163.

LEX CONTRACTUS:
The negotiability of a promissory note is governed by the law of the place (State) where it is made payable. The laws of another State will be presumed to be the same as the one where the action is brought, unless they are brought to the attention of the court by the pleadings and competent proof. Page 258a.

LIABILITY:
Under the common-law rule in Kentucky, one signing his name to a blank note and delivering it to another to be used to raise money is responsible for whatever sum the latter inserts in the body of the note. No. 1169.

LIENS:
When a note and a mortgage securing it are transferred to an innocent holder for value, such holder has a lien upon the real estate which is free from all latent equities of persons who are strangers to the title. No. 1096.

LIMITATIONS OF ACTIONS:
Limitations on an action by a surety against the principal for reimbursement run, not from the time when the debt was due, but from the time when the surety paid it. Page 287a, No. 1154.

LOST INSTRUMENTS:
Equitable jurisdiction to establish lost instrument may be invoked respecting negotiable instruments. No. 1173.

MALA FIDES:
Bad faith is the test and not knowledge of circumstances which would arouse the suspicions of a holder, in determining whether or not the plaintiff, in an action upon a promissory note, is an innocent holder. Page 101a, No. 1103.

MATERIAL ALTERATION:
The material alteration of a note subsequent to its execution and without the consent of the makers and indorsers renders the note invalid in the hands of the original payee and in the hands of a bona fide holder. The erasure of a name of one of the joint makers, after delivery of the note and without knowledge of the other joint makers, is a material alteration. Page 97a, No. 1102.

MEETING OF MINDS:
Mutual assent is necessary to the formation of every contract, and any mistake of the parties by which one of the contracting parties has in mind one thing as the subject-matter of the contract, and the other party has in mind something entirely different, and where the terms of the contract are such that it will mean either the one or the other, there is no meeting of the minds of the contracting parties, and therefore no contract. 80a.

MINING PARTNERSHIP:
To constitute a partnership the members must join together in a common enterprise, each contributing either property or services, and they must have a community of interest in the profits. If there is an agreement to share the profits, prima facie this amounts to an agreement to share the losses. Mining partnerships exist if each partner has a personal interest in the working of the mine. Agency results from the existence of the partnership and not the partnership from the fact of agency. 75a, No. 1094.

MISREPRESENTATIONS:
In an action on notes given in consideration of stock purchased from the company's president's agent, which notes were payable to the

Digitized by Google

MISREPRESENTATIONS — Continued.
company and indorsed by the company to the plaintiff in the action, who was also a director in the company, and which action was defended by the makers on the ground that there were misrepresentations as to the value of the stock, does not necessarily constitute the holder a holder in bad faith. The test is, did he act in bad faith? 72a, No. 1093.

MISTAKE:
Where the evidence is convincing to the mind of the court that in the execution of a note and mortgage there has been fraud on one side and mistake on the other, the court will, in its equitable jurisdiction, reform the instruments. No. 1097.

MORTGAGES:
When a note and a mortgage securing it are transferred to an innocent holder for value, such holder has a lien upon the real estate which is free from all latent equities of persons who are strangers to the title. No. 1096.

MUTUALITY:
Contracts which provided for a succession of acts involving special knowledge and skill will not be specifically enforced by a court of equity. Where one party to a contract cannot be compelled to specifically perform his side of the contract, he cannot bring an action to compel specific performance on the part of the other party to the contract. Page 133a.

NEGLIGENCE:
It is not negligence for a bank to pay a check which was written on the blank form of another bank, nor is it negligence for the bank to pay a check, the body of which is not in the handwriting of the maker. The bank is only required to know the signature of the drawer. Page 116a, No. 1109.

NEGOTIABILITY:
The negotiability of a promissory note is governed by the law of the place (State) where it is made payable. The laws of another State will be presumed to be the same as the one where the action is brought, unless they are brought to the attention of the court by the pleadings and competent proof. Page 258a.

NEGOTIABILITY — Continued.
An instrument to be negotiable must be payable to order or to bearer. An accommodation indorser of a non-negotiable note is liable as guarantor to the payee, if he indorsed for the accommodation of the maker, and must pay if the maker does not. Page 214a, No. 1130.
The negotiability of a promissory note is not destroyed by a provision therein "that the makers and indorsers thereof severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice," when by its terms it is made payable on or before a day named, according to a decision of the highest court of North Dakota. 1a, No. 1080.

NEGOTIABILITY:
Certificates of deposit may by their terms be negotiable. No. 1173.

NEGOTIABLE INSTRUMENTS:
Equitable jurisdictions to establish lost instrument may be invoked respecting negotiable instruments. No. 1173.

NEGOTIABLE INSTRUMENTS LAW:
Under the Negotiable Instruments Law the accommodation maker of a promissory note is not discharged by an agreement between the holder of the note and the co-maker, extending the time of payment, for the reason that the accommodation maker of a note is not a party secondarily liable, but primarily liable, being absolutely required to pay the note. Page 202a, No. 1123.
The Negotiable Instruments Law requires that a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay, and the courts hold that where the parties to a check reside in the same community a reasonable time for presentment ends with the next day thereafter. Page 210a, No. 1127.
A stockholder who, with other stockholders, indorsed a note to the corporation, given to raise money for the benefit of the company and the stockholders, and with the understanding that all the stockholders were equally bound, was not entitled to notice of dishonor for the reason that the Negotiable Instruments Law provides that no notice of dishonor

Digitized by Google

NEGOTIABLE INSTRUMENTS LAW — Continued.

is required to charge an indorser where the instrument is made or accepted for his accommodation. Page 243a, No. 1132.

The Negotiable Instruments Law defines a holder in due course as one who takes a negotiable instrument, complete and regular upon its face, before it is over-due, and without notice of dishonor, in good faith and for value, and who at the time of transfer has no notice of any infirmity in it or defect in the title of the person negotiating it. When an action is brought and the defendant proves that the note was obtained from him by fraud the burden then shifts to the holder to show that he is a holder in due course, and whether or not he has met this burden is a question for the jury and not for the court. Page 249a, No. 1134.

Under the Negotiable Instruments Law a person who places his signature on a negotiable instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser unless he clearly indicates his intention to be bound otherwise, and failure to give him notice of the non-payment and dishonor of the note discharges him. Page 248a, No. 1133.

The Negotiable Instruments Law provides that every holder of a negotiable instrument is prima facie a holder in due course; but when the title of any one negotiating the instrument is shown to be defective, the burden is on the holder to prove title acquired in due course. Another section provides what things constitute a defective title and among them is a note given for an illegal consideration. It was held that a failure of consideration did not constitute a defective title so as to shift the burden of proof to the holder, the burden of showing failure of consideration and notice being upon the maker. Page 251a, No. 1135.

The Negotiable Instruments Law provides that presentment and notice of dishonor are necessary to charge an indorser. It also provides that the presentment and notice may be dispensed with by an express or implied waiver. Where a corporation executed a note and the president of the corporation indorsed it individually, and before the note's maturity the corporation, the maker, went into involuntary bankruptcy and the president signed an admission of the company's inability to pay its debts and willingness to be adjudicated bankrupt, the payee can recover of the indorser, also the president of the maker, notwithstanding the failure of the payee to present the instrument for payment and to give notice of its dishonor to the indorser. Page 213a, No. 1129.

The lessors of a hotel agreed to lease the same to one K. if H. would be some guarantor for performance of lease. L. did so. It was further agreed that the lessors should purchase the furniture of the former lessee, giving in part payment a note made by K., the new lessee, to the order of the former lessee, and indorsed by L. L. was liable as indorser on this note under the Negotiable Instruments Law, which provides that a person placing his signature on a note otherwise than as maker is liable as indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, and one placing his signature on back of note, payable to a third party, is liable to payee and all subsequent parties. Where indorsement is obtained by fraudulent representations indorser may successfully defend. Page 234a.

A drawer of a check is discharged unless he is given notice of a check's dishonor when a bank refuses payment, where the drawer had sufficient funds in the bank to meet it. This notice is required by the Negotiable Instruments Law. Page 257a.

Where the drawer of a check used the name of a payee who was an existing person, but such drawer never intended that this person should receive the check, the check is payable to a fictitious payee, and as the Negotiable Instruments Law provides that a check which is payable to a fictitious or non-existing person and such fact is known to the drawer, is payable to bearer, such a check is payable to bearer. A bank properly charged to a depositor's account a check drawn by the depositor's employee to the order of a fictitious payee, whose name the employee had indorsed on the back of the check. Page 188a, No. 1117.

Presentment for payment and notice of dishonor, under the Negotiable Instruments Law of Pennsylvania, are not necessary in order to charge indorsers where the instrument was

Digitized by Google

NEGOTIABLE INSTRUMENTS LAW — Continued.

made or accepted for their accommodation and they had no reason to expect that the instrument would be paid if presented, consequently where the maker of the note is a corporation and the indorsers are officers, also directors and stockholders of that corporation, and the money was loaned to the corporation on the strength of the individual indorsements of such officers, no presentment or notice is necessary for the reason that the instrument was executed for their accommodation. Page 197a, No. 1121.

A note to be negotiable must be payable to order or bearer under the Negotiable Instruments Law, and where a note is payable to "The M. Ryan estate only," it is a non-negotiable note; but having been transferred by the administratrix of the estate to a bank, and the bank suing the maker, the bank was entitled to recover, having introduced the note in evidence on the trial, there being no evidence introduced by the defendant, for the reason that a party has a right to sue even if he has only the naked legal title, although the money when collected may belong to someone else. 25a.

Section 116 of the Negotiable Instruments Law provides that an indorser without qualification warrants to all subsequent holders that the instrument is valid and subsisting at the time of his indorsement, therefore an indorser cannot escape liability on the ground that the note was void because of usury between the original parties. 19a, No. 1088.

A signature of an estate, which was a depositor in a trust company, was forged on a check drawn on the trust company and payable to one of the distributors of the estate whose signature was also forged. The check was paid by the bank, and the trust company upon discovering the forgery sued the bank to recover the money it had paid upon these forged checks. The Appellate Division of the State of New York held that it could not be recovered for the reason that it should know the signatures of its depositors and that the check being payable to the order of a fictitious payee. If the trust company had detected the forgery of the drawer, neither the trust company nor the bank would have suffered loss. 21a.

Where a person has custody of certain

NEGOTIABLE INSTRUMENTS LAW — Continued.

notes, which are made payable to him and two other payees and indorsed by the three, and he wrongfully pledged them to a bank, the bank surrendering certain collateral which it held for this individual's indebtedness, and substituting the notes in place of it, the bank could recover unless to two other payees could show that the bank was not a holder in good faith. The bank paid value for the notes because the Negotiable Instruments Law provides that a pre-existing or antecedent indebtedness constitutes value. Page 142a.

Under the Negotiable Instruments Law one can be a holder in due course of a negotiable instrument, only where it is complete and regular upon its face, consequently a bank is not a bona fide holder of a note sent to it to meet over-drafts of the payee, who has indorsed the notes to the order of the bank, where the notes are blank as to date, time of payment and amount, and the cashier of the bank was authorized by the president of the payee corporation to fill in the blanks. Page 95a, No. 1101.

A note was made by defendant in favor of O to enable O to take up a forged note indorsed to plaintiff, by O, and under the Negotiable Instruments Law, which provides that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon is deemed a party thereto for value, the plaintiff could recover against the defendant, for O was liable as an indorser of the forged note, whether he knew it was forged or not and plaintiff had a right to accept defendant's note in settlement of O's liability and there was no evidence of an agreement to quash a criminal case which was pending against O for having uttered the forged note. Page 107a, No. 1105.

A promissory note which contains a provision that it is subject to the conditions of a certain contract of even date is non-negotiable because it is not an unconditional promise or order to pay a sum certain in money and being non-negotiable the maker may set up against the innocent holder the same defense which he could set upon against the payee. Page 106a, No. 1104.

Digitized by Google

NEGOTIABLE INSTRUMENTS LAW: — Continued

There is an implied representation on the part of the drawer of a bill of exchange that he has funds in the hands of the drawee sufficient to pay the bill, and when the bill is accepted by the drawee he admits the truth of this implied representation. The Negotiable Instruments Law provides that when a bill is dishonored by non-acceptance the holder had an immediate right to recourse against the drawer and indorsers, and under this law it has been held that although the bill is payable at a fixed time, it may be presented for acceptance at any time, and if the acceptance is refused or cannot be obtained, the holder may treat the bill as dishonored. Page 85a, No. 1098.

NEGOTIATION:

A check is only a provisional payment of a debt, but it becomes absolute where the authorized agent of the creditor indorsed the creditor's name on the check and negotiated the same to a third party. Delay in the presentment of a check will relieve the drawer of liability where he has been injured by the delay and where the parties reside in the same community, twenty-four hours is considered a reasonable time within which a check should be presented for payment after its receipt. Page 111a, No. 1107.

NON-NEGOTIABILITY:

A note to be negotiable must be payable to order or bearer under the Negotiable Instruments Law, and where a note is payable to "The M. Ryan estate only," it is a non-negotiable note; but having been transferred by the administratrix of the estate to a bank, and the bank suing the maker, the bank was entitled to recover, having introduced the note in evidence on the trial, there being no evidence introduced by the defendant, for the reason that a party has a right to sue even if he has only the naked legal title, although the money when collected may belong to some one else. 25a.

A promissory note which contains a provision that it is subject to the conditions of a certain contract of even date is non-negotiable because it is not an unconditional promise or order to pay a sum certain in money and being non-negotiable the

NON-NEGOTIABILITY — Continued.

maker may set up against the innocent holder the same defense which he could set up against the payee. Page 106a, No. 1104.

NON-NEGOTIABLE NOTE:

An instrument to be negotiable must be payable to order or to bearer. An accommodation indorser of a non-negotiable note is liable as guarantor to the payee, if he indorsed for the accommodation of the maker, and must pay if the maker does not. Page 214a, No. 1130.

NOTE PAYABLE IN INSTALMENTS:

When several instalments of a note payable in instalments are overdue and unpaid the whole note is past due. Page 286a, No. 1153.

NOTICE:

Notwithstanding the fact that a note was transferred in violation of a written contract by the payee, a corporation, and it came into the hands of another corporation by a subsequent assignment, the president of which latter corporation was also an officer of the payee corporation and knew of the circumstances under which the note was executed, still his knowledge would not be notice to the corporation unless it was also shown that his knowledge was acquired while acting as president of the corporation, to which the note was transferred. When the defendant proves that there was fraud in the inception of the note, the burden of proof shifts to the plaintiff to show that he is an innocent holder for value before maturity. Page 88a, No. 1099.

Under the Negotiable Instruments Law a person who places his signature on a negotiable instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser unless he clearly indicates his intention to be bound otherwise, and failure to give him notice of the non-payment and dishonor of the note discharges him. Page 248a, No. 1133.

A member of a commercial partnership may borow money for the use of the partnership and issue its note, without knowledge of his associates, who will be bound. Private limitations upon the authority of a member of a commercial partnership to borrow money for the use of the partnership and issue its

Digitized by Google

NOTICE — Continued.

note cannot effect a holder who takes the note without knowledge of them. No. 1144.

NOTICE OF DISHONOR:

Presentment for payment and notice of dishonor, under the Negotiable Instruments Law of Pennsylvania, are not necessary in order to charge indorsers where the instrument was made or accepted for their accommodation and they had no reason to expect that the instrument would be paid if presented, consequently where the maker of the note is a corporation and the indorsers are officers, also directors and stockholders of that corporation, and the money was loaned to the corporation on the strength of the individual indorsements of such officers, no presentment or notice is necessary for the reason that the instrument was executed for their accommodation. Page 197a, No. 1121.

A drawer of a check is discharged unless he is given notice of a check's dishonor, when a bank refuses payment, where the drawer had sufficient funds in the bank to meet it. This notice is required by the Negotiable Instruments Law. Page 257a.

A stockholder who, with other stockholders, indorsed a note of the corporation, given to raise money for the benefit of the company and the stockholders, and with the understanding that all the stockholders were equally bound, was not entitled to notice of dishonor for the reason that the Negotiable Instruments Law provides that no notice of dishonor is required to charge an indorser where the instrument is made or accepted for his accommodation. Page 243a, No. 1132.

The Negotiable Instruments Law provides that presentment and notice of dishonor are necessary to charge an indorser. It also provides that the presentment and notice may be dispensed with by an express or implied waiver. Where a corporation executed a note, and the president of the corporation indorsed it individually and before the note's maturity the corporation, the maker, went into involuntary bankruptcy and the president signed an admission of the company's inability to pay its debts and willingness to be adjudicated bankrupt, the payee can recover of the indorser, also the president of the maker, notwithstanding the failure of the payee to present the instrument for payment and to give notice of its dishonor to the indorser. Page 213a, No. 1129.

NOTICE — Continued.

An allegation that notice of dishonor was given to one who was present at the indorser's place of business and in his employment was a sufficient allegation of notice to the indorser. A verbal notice of dishonor to an indorser is sufficient, even though it was given to the agent of the indorser. No particular form of notice of dishonor of a negotiable note is necessary; it being sufficient that the party liable is informed of its dishonor and notified that it will be held for payment. Page 291a, No. 1160.

Where a notary uses diligence and exercises good faith in mailing a notice of protest to an indorser, the indorser will be charged with liability on the note, even though he did not receive the notice of protest until three months after it was mailed, the evidence showing that there had been proper presentment and that the indorser received his mail at a place which was one mile farther away from him, than another place, which was a larger place than the one at which he received his mail. Page 109a, No. 1106.

ORDER TO PAY MONEY:

An order for the payment of money, addressed to no one in particular, but generally to any one for whom the maker might be employed or who owed him money, is too indefinite and uncertain to be binding on any one. Action cannot be maintained on an unaccepted order. No. 1161.

PAROL EVIDENCE:

Where the drawer of a draft had agreed with the indorser of a draft that he would extend credit to the drawee provided the indorser would guarantee the draft by his indorsement and the draft was subsequently drawn payable to the order of the drawer and accepted by the drawee, having been previously indorsed by the indorser before its delivery, the indorser is liable to the drawer of the draft, because parol evidence may be introduced to show what is the respective liability as between indorsers and after acceptance the draft is virtualy a promissory note made by the acceptor and payable to the payee. Page 191a, No. 1119.

Digitized by Google

PARTNERSHIP:

To constitute a partnership the members must join together in a common enterprise, each contributing either property or services, and they must have a community of interest in the profits. If there is an agreement to share the profits, prima facie this amounts to an agreement to share the losses. Mining partnerships exist if each partner has a personal interest in the working of the mine. Agency results from the existence of the partnership and not the partnership from the fact of agency. 75a, No. 1094.

The acceptor of a draft sought to escape liability by showing that the firm which drew the draft had been dissolved and that it had notified the payee that it would honor the draft of the partnership and by reason of the dissolution that the partnership was no longer in existence and therefore the acceptor was not liable, but it was held that actual knowledge of the dissolution by the payee must be shown, the payee having had other drafts drawn by the same firm paid by the same acceptors. It was further held that the acceptor of a bill of exchange becomes primarily liable for its payment, and is to be considered the principal debtor, or even though the acceptance is for the accommodation of the drawer, the acceptor having no funds in his hands to pay it. 11a, No. 1084.

A member of a commercial partnership may borrow money for the use of the partnership and issue its note, without knowledge of his associates, who will be bound. Private limitations upon the authority of a member of a commercial partnership to borrow money for the use of the partnership and issue its note cannot effect a holder who takes the note without knowledge of them. No. 1144.

A partnership agreement provided that the partnership was to continue for five (5) years and in case any partner desired to withdraw, he should give at least ten (10) days' notice and the remaining partners would return the amount he had paid for his interest. It was held that the provision for the continuance of the partnership for five (5) years was a limitation fixed in case one of the partners did not withdraw, but if one of the partners elected to withdraw, the partnership was thereby dissolved and the withdrawing partner had a right to an accounting. Page 155a.

PARTNERSHIP INDORSEMENT:

Where one takes the note of one of the members of partnership, indorsed by the partnership, in payment of an individual obligation or as collateral security for an individual obligation, he is charged with inquiry as to whether the member of the partnership making the note has the right to indorse the name of the partnership and if he does not inquire and it transpires that the member had no right to so indorse the firm name, the other partner will not be liable. Page 256a.

PAYEE'S NAME OMITTED:

Leaving blank the name of the payee of a check gives to any bona fide holder for value implied authority to fill blank with his own name or that of a third person, and so, likewise, where all that was required to make a check out of a forged instrument delivered by defendant in payment was the insertion of the name of the payee, the delivery constituted the transferee defendant's agent with authority to fill in the blank with his own name, and a claim that the instrument was not a check or an instrument for the payment of money within the meaning of Penal Code, when passed by defendant is without merit. Where the name of the payee is left blank in a check, the effect of such paper until the name of the payee is inserted pursuant to authority conferred on the receiver by its delivery for value is that it is payable to the bearer, and passes from hand to hand by mere delivery. Page 272a, No. 1138.

PAYMENT BY MISTAKE:

Where an individual pays the note of another by mistake the debt was extinguished and the note being transferred to the individual paying it by the indorsement of the cashier of the bank to which the note was sent for collection is not entitled under this indorsement to sue as a holder and having without authority paid another's debt, he is not entitled to subrogation. No. 1095.

PAYMENTS AFTER TRANSFER:

Where defendant made payments on a note to L. after he had transferred the note to a bona fide holder for value before maturity, and without insisting in L.'s production thereof or some proof that he was still the holder, they were not entitled to credit for such payments as against the holder. Page 293a, No. 1167.

Digitized by Google

PERSONS ENTITLED:

A note pledged by a third party as security for the payment of a debt stands in the position of a surety for the payment of the principal debt, and funds paid upon the pledged note will be applied upon the debt secured. No. 1168.

PLEDGES:

The pledgee of a mortgage has a right to foreclose it, even though the contract of pledge only authorizes the pledgee to sell the mortgage. The pledgee of a note may collect it when it becomes due. The individual and corporate stock may be collected by a pledgee of the stock. No. 1156.

PRE-EXISTING INDEBTEDNESS:

Prior to the Negotiable Instruments Act, passed in Michigan in 1905, a person holding a note as collateral security for an existing indebtedness was not a holder for value, but under the Negotiable Instruments Law which provides that value is any consideration sufficient to support a simple contract, and that an antecedent or pre-existing indebtedness constitutes value, a person holding a note as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him. Page 212a, No. 1128.

PREFERENCES:

A trustee in bankruptcy can recover land showing that bankrupt was insolvent when he deeded it to defendant; that the transfer enabled defendant, as a creditor, to obtain a greater percentage of his debt than other creditors of the same class; that defendant had reasonable cause to believe that the conveyance was intended to give him a preference, and that the petition in bankruptcy was filed within four months after the deed was recorded. Page 277a, No. 1140.

PRESENTATION:

If the holder of a check negligently fails to present the same for payment until after the bank upon which it is drawn closes its doors, and the drawer had sufficient funds at the bank to pay the check at the time it was drawn. the drawer would be released: but the drawer is not released if the holder used due diligence in presenting the check for payment. 70a, No. 1092.

PRINCIPAL AND AGENT:

The words "president" and "trustee" after names are merely descriptio personæ, and have no force and effect, and where a note is made payable to a man as president and executed by another as trustee, the transaction is one between these two individuals and the undisclosed principals of the maker of the not will not be charged with liability on the note. The undisclosed principals, however, may be charged with liability by reason of the original consideration, for the execution of the note by the principals themselves would not have abrogated the right of the other party to sue upon the original consideration and neither would the execution of the note by their agent effect the right of the other party to sue upon the original consideration. Page 92a, No. 1100.

Where a party gives his agent a note for collection and the debtor gives a check in payment of the note to the agent, and the agent presents the check to the bank upon which it is drawn for payment and indorses the name of the principal, to whom the check is payable, and the bank pays the check, the principal may recover from the bank, because an agent with authority to collect a note does not also have authority to indorse the name of her principal to the check. Page 204a, No. 1124.

PRESENTMENT:

A check is only a provisional payment of a debt, but it becomes absolute where the authorized agent of the creditor indorsed the creditor's name on the check and negotiated the same to a third party. Delay in the presentment of a check will relieve the drawer of liability where he has been injured by the delay and where the parties reside in the same community, twenty-four hours is considered a reasonable time within which a check should be presented for payment after its receipt. Page 111a, No. 1107.

Where a draft at sixty days sight is drawn against a consignment of wheat, the fact that it has a bill of lading for the wheat attached, and contain the words. "to be surrendered upon payment of this bill before maturity under discount on or before the arrival of vessel," will not change the time of maturity, and a custom or usage cannot be permitted to be shown in order to

Digitized by Google

PRESENTMENT — Continued.

fix a different maturity from that plainly appearing on the face of a draft. 58a.

The liability of the indorser of a check is conditioned on its prompt presentment for payment on the part of the holder and notice of nonpayment, and if the holder is negligent in presenting the check for payment, the indorser would be released even though a prompt presentment would have been unavailing, unless it appears that the indorser knew at the time when he passed the check that there were or would be no funds in the bank to meet it. 55a.

A note was made payable at the residence of the maker and at its maturity the maker was called up on the telephone by the bank to which it had been sent for collection, and was asked what he was going to do about it. He replied that he could not pay it and was informed that the note would be protested. It was held that the demand over the telephone was a sufficient presentment for payment and that the statutory right of the maker to an exhibition of the note was waived by his failure to insist upon it. Page 188a, No. 1118.

Presentment for payment and notice of dishonor, under the Negotiable Instruments Law of Pennsylvania, are not necessary in order to charge indorsers where the instrument was made or accepted for their accommodation, and they had no reason to expect that the instrument would be paid if presented, consequently where the maker of the note is a corporation, and the indorsers are officers, also directors and stockholders of that corporation, and the money was loaned to the corporation on the strength of the individual indorsements of such officers, no presentment or notice is necessary for the reason that the instrument was executed for their accommodation. Page 197a, No. 1121.

The Negotiable Instruments Law provides that presentment and notice of dishonor are necessary to charge an indorser. It also provides that the presentment and notice may be dispensed with by an express or implied waiver. Where a corporation executed a note, and the president of the corporation indorsed it individually, and before the note's maturity the corporation, the maker, went into involuntary bankruptcy and the president signed an admission of the company's inability to pay its debts and willingness to be adjudicated bankrupt, the payee can recover of the indorser, also the president of the maker, notwithstanding the failure of the payee to present the instrument for payment and to give notice of its dishonor to the indorser. Page 213a, No. 1129.

PRESENTMENT FOR PAYMENT:

The Negotiable Instruments Law requires that a check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay and the courts hold that where the parties to a check reside in the same community a reasonable time for presentment ends with the next day thereafter. Page 210a, No. 1127.

PROMISSORY NOTE:

A promissory note is an unconditional promise in writing to pay a sum certain in money at a fixed or determinable future time. Page 242a.

RECEIVING DEPOSITS:

If a person deposits in a bank for his credit a check, and it is presently treated between such person and such bank as money, the former obtaining credit upon which he may, at his pleasure, draw for money, section 4541, St. 1898, is satisfied, as regards a deposit of money. No. 1146.

REFORMATION OF INSTRUMENTS:

Where the evidence is convincing to the mind of the court that in the execution of a note and mortgage there has been fraud on one side and mistake on the other, the court will, in its equitable jurisdiction, reform the instruments. No. 1097.

REIMBURSEMENT OF SURETY:

Limitations on an action by a surety against the principal for reimbursement run, not from the time when the debt was due, but from the time when the surety paid it. Page 287a, No. 1154.

REPRESENTATIONS:

If the sale of a horse was induced by fraud, the sale may be rescinded by restoring the horse, if the buyer acts within a reasonable time, and

Digitized by Google

REPRESENTATIONS — Continued.
notwithstanding the fact that the horse may be worth what the buyer paid. The buyer is entitled to a horse worth what the seller represented him to be worth. Page 171a.

RESCISSION:
If the sale of a horse was induced by fraud, the sale may be rescinded by restoring the horse, if the buyer acts within a reasonable time, and notwithstanding the fact that the horse may be worth what the buyer paid. The buyer is entitled to a horse worth what the seller represented him to be worth. Page 171a.

RES JUDICATA:
Where a bill of exchange is payable in France, the law of that country would determine what constitutes payment. A firm in New York drew two sets of drafts, originals and duplicates, upon a bank in Paris, the duplicates to be paid only in case the originals were unpaid. The duplicates were presented for payment and paid by the French bank, one of the indorsements having been forged. The person whose name had been forged sued the bank in France, and the judgment was in favor of the bank. Subsequently an action was brought in America by the payee against the drawer of the bill and it was held that the payee could recover, the judgment in France not being a bar, because the evidence showed that the French bank was negligent and therefore not entitled to the protection of Code de Commerce, article 145. Page 159a.

SALES:
The defendants, who are indorsers upon four (4) promissory notes, negotiated with the plaintiff for the purchase of some stock and the contract for the purchase of the stock was made with one Paine. A corporation was formed to take over the stock of the other corporation, and as part payment for the stock of the corporation, notes were given which were executed by the new corporation to his own order, indorsed by it, and also by the defendants. The defendants contested their liability upon some renewal notes on the ground that they were defrauded in the purchase of this stock. Held they were liable on the notes as indorsers. Page 120a, No. 1111.

SALES — Continued.
If the sale of a horse was induced by fraud, the sale may be rescinded by restoring the horse, if the buyer acts within a reasonable time, and notwithstanding the fact that the horse is worth what the buyer paid. The buyer is entitled to a horse worth what the seller represented him to be worth. Page 171a.
Where a party buys an engine to furnish power for a cotton ginnery, and the seller knows that the ginnery will remain idle unless the engine is promptly delivered, and the engine is not promptly delivered, the purchaser may counterclaim as damages to the suit of the seller for the purchase price of the engine, the value of the use of the plant for the period the plant remained idle and for which the non-delivery of the engine is responsible. Damages cannot be speculative or contingent. Page 173a.
Special damages may be recovered for breach of a contract of sale for delay in delivering within time required by the contract which the purchaser had with another where these damages are the natural and direct result of the breach and the circumstances were within the knowledge of the seller, although not stated in the formal contract, and where the amount of such damages is ascertainable with reasonable certainty. Page 178a.
Mutual assent is necessary to the formation of every contract, and any mistake of the parties by which one of the contracting parties has in mind one thing as the subject-matter of the contract, and the other party has in mind something entirely different, and where the terms of the contract are such that it will mean either the one or the other, there is no meeting of the minds of the contracting parties, and therefore no contract. 80a.
A contract for the sale of goods, wares and merchandise of the value of more than fifty dollars is within the Statute of Frauds and unless it is in writing it cannot be proved. Where a contract of sale is made and no time is specified for delivery, delivery must be made within a reasonable time. Page 264a.

SAVINGS BANKS:
Notwithstanding the fact that the rules and regulations of a savings bank, which are printed upon the pass-book of the depositor and to

Digitized by Google

SAVINGS BANKS—Continued.
which the deposition agrees, require that a deposition must give notice of a lost or stolen book and if the bank pays out the money upon the presentation of the deposit book, it will not be liable, the Supreme Court of Ohio held that the bank must exercise good faith and use reasonable care in making such payment, otherwise it would be liable to the depositor. Page 97a.
A by-law of a savings bank provides that payments to persons presenting a passbook issued by the bank should discharge the bank though the bank would endeavor to prevent fraudulent payments. Held a contract by the bank to take ordinary care not to pay other than the depositors, but saving it harmless on payments of the deposit to one other than the person rightfully entitled thereto on presentation of the passbook. Where the bank book of a depositor in a savings bank has been stolen, it will not defeat an action by the depositor to recover a balance to his credit in the bank that he is unable to produce the book, though there is a statutory requirement that no savings bank may make any payment except on production of the book. No. 1162.

SIGNATURE IN BLANK:
Under the common-law rule in Kentucky, one signing his name to a blank note and delivering it to another to be used to raise money is responsible for whatever sum the latter inserts in the body of the note. No. 1169.

SPECIAL DEPOSIT:
A bank receiving a deposit with notice that it is made to meet outstanding checks drawn by the depositor may not charge the depositor's account with a debt due it from him, and thus defeat collection of the outstanding checks. No. 1170.
A general deposit is where the bank is given custody of the money deposited with the intention expressed or implied that the bank is not required to return the identical money, but only its equivalent, the legal title to the money in such cases passing to the bank. A special deposit is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive the identical thing deposited in which case the title remains with

SPECIAL DEPOSIT—Continued.
the depositor, and if the subject be money, the bank has no right to mingle it with other funds. In the absence of proof to the contrary, a deposit in a bank is presumed to be general, and it devolves upon the party claiming the contrary to show that it was received by the bank with an express or clearly implied agreement that it should be kept separate from the other funds of the bank and the identical money or property be returned to the depositor. No. 1164.

SPECIFIC PERFORMANCE:
Contracts which provided for a succession of acts involving special knowledge and skill will not be specifically enforced by a court of equity. Where one party to a contract cannot be compelled to specifically perform his side of the contract, he cannot bring an action to compel specific performance on the part of the other party to the contract. Page 133a.

STATUTE OF FRAUDS:
A contract for the sale of goods, wares and merchandise of the value of more than fifty dollars is within the Statute of Frauds and unless it is in writing it cannot be proved. Where a contract of sale is made and no time is specified for delivery, delivery must be made within a reasonable time. Page 264a.
The extension of the time of payment of another's debt constitutes a good consideration for a promissory note, and a promissory note being necessarily in writing, the Statute of Frauds is not involved. Page 216a, No. 1131.

SUBROGATION:
Where an individual pays the note of another by mistake the debt was extinguished and the note being transferred to the individual paying it by the indorsement of the cashier of the bank to which the note was sent for collection is not entitled under this indorsement to sue as a holder, and having authority paid another's debt, he is not entitled to subrogation. No. 1095.

TRANSFER WITHOUT INDORSEMENT:
Under Negotiable Instruments Law (Laws 1897, p. 731, c. 6112), § 79, providing that where the holder of

Digitized by Google

TRANSFER WITHOUT INDORSEMENT — Continued.

an instrument payable to his order transfers it for value without indorsing it, the transferee obtains such title as the transferror had, an assignment of a note payable to a foreign corporation or order, without indorsement, does not make the assignee a holder in due course, as defined by Negotiable Instruments Law, §§ 2, 60, 61, 91, and 98. Page 281a, No. 1148.

ULTRA VIRES:

The president of a national bank had written a State bank obligating his bank to pay all checks of a corporation not aggregating more than $5,000 weekly, and the national bank afterwards telegraphed that it would protect the corporation's checks for $5,000 weekly in excess of present guaranty, and later that the State bank would pay checks in excess of guaranty drawn during the current week. The bank cashed some of the checks, and before the checks could be paid by the national bank, the national bank also failed. It was held that the State bank had no right of action against the national bank on the guaranty, as the president of the national bank had exceeded his powers, and the State bank was chargeable with notice that the credit and resources of the national bank were being unlawfully used. 29a.

The corporation cannot retain the proceeds of a purchase for the consideration of which it gave its promissory note and set up the defense of ultra vires to defeat the recovery of the holder of the promissory note against it. 10a, No. 1083.

UNDISCLOSED PRINCIPAL:

The defendants, who are indorsers upon (4) promissory notes, negotiated with the plaintiff for the purchase of some stock and the contract for the purchase of the stock was made with one Paine. A corporation was formed to take over the stock of the other corporation, and as part payment for the stock of the corporation, notes were given which were executed by the new corporation to his own order, indorsed by it, and also by the defendants. The defendants contested their liability upon some renewal notes on the ground that they were defrauded in the purchase of this stock. Held they were liable on the notes as indorsers. Page 120a, No. 1111.

UNDISCLOSED PRINCIPAL — Cont'd.

The words "president" and "trustee" after names are merely descriptio personæ, and have no force and effect, and where a note is made payable to a man as president and executed by another as trustee, the transaction is one between these two individuals and the undisclosed principals of the maker of the note will not be charged with liability on the note. The undisclosed principals, however, may be charged with liability by reason of the original consideration, for the execution of the note by the principals themselves would not have abrogated the right of the other party to sue upon the original consideration and neither would the execution of the note by their agent effect the right of the other party to sue upon the original consideration. Page 92a, No. 1111.

USURY:

A note is not usurious which is payable twelve months after date and provides that if the interest is not paid annually the unpaid interest shall become as principal and bear the same rate as the principal. 57a.

VOIDABLE PREFERENCE:

In a suit by the trustee in bankruptcy of a partnership to recover payments made to a creditor as a preference to authorize a recovery it must be shown that the firm and the partners also were insolvent when the payments were made. To render a payment made by a bankrupt to a creditor voidable as a preference under Bankruptcy Act it must appear that it was in fact intended to give a preference and that the creditor had reasonable cause to believe that it was so intended; and mere suspicion or slight proof is not sufficient. No. 1141.

VOLUNTARY ASSOCIATIONS:

Members of a voluntary association, signing a note by the association, are individually liable thereon, regardless of their intentions respecting liability or their belief as to the law relating thereto, and even though their signatures were followed by abbreviation indicating their offices in the association. No. 1151.

VALUE:

Where a person has custody of certain notes, which are made payable to him and two other payees and in-

Digitized by Google

VALUE — Continued.

dorsed by the three, and he wrongfully pledged them to a bank, the bank surrendering certain collateral which it held for this individual's indebtedness, and substituting the notes in place of it, the bank could recover unless the two other payees could show that the bank was not a holder in good faith. The bank paid value for the notes because the Negotiable Instruments Law provides that a pre-existing or antecedent indebtedness constitutes value. Page 142a.

VENDER AND PURCHASER:

The words "president" and "trustee" after names are merely descriptio personæ, and have no force and effect, and where a note is made payable to a man as president and executed by another as trustee, the transaction is one between these two individuals and the undisclosed principals of the maker of the note will not be charged with liability on the note. The undisclosed principals, however, may be charged with liability by reason of the original consideration, for the execution of the note by the principals themselves would not have abrogated the right of the other party to sue upon the original consideration and neither would the execution of the note by their agent effect the right of the other party to sue upon the original consideration. Page 92a, No. 1100.

WAIVER:

The negotiability of a promissory note is not destroyed by a provision therein "that the makers and indorsers thereof severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice," when by its terms it is made payable on or before a day named, according to a decision of the highest court of North Dakota. 1a. No. 1080.

A note was made payable at the residence of the maker and at its maturity the maker was called up on

WAIVER — Continued.

the telephone by the bank to which it had been sent for collection, and was asked what he was going to do about it. He replied that he could not pay it and was informed that the note would be protested. It was held that the demand over the telephone was a sufficient presentment for payment and that the statutory right of the maker to an exhibition of the note was waived by his failure to insist upon it. Page 188a, No. 1118.

The Negotiable Instruments Law provides that presentment and notice of dishonor are necessary to charge an indorser. It also provides that the presentment and notice may be dispensed with by an express or implied waiver. Where a corporation executed a note, and the president of the corporation indorsed it individually, and before the note's maturity the corporation, the maker, went into involuntary bankruptcy and the president signed an admission of the company's inability to pay its debts and willingness to be adjudicated bankrupt, the payee can recover of the indorser, also the president of the maker, notwithstanding the failure of the payee to present the instrument for payment and to give notice of its dishonor to the indorser. Page 213a, No. 1129.

WHAT LAW GOVERNS:

Where a note was executed in Michigan and sent to Wisconsin for the signature of a person, who signed his name on the back and by direction of the maker sent it to the payee in Michigan, it was a Michigan contract, and the liabilty of the person who signed his name on the back thereof was governed by the law of that State. Page 286a. No. 1152.

WHEN PAST DUE:

When several instalments of a note payable in instalments are overdue and unpaid the whole note is past due. Page 286a, No. 1153.

Digitized by Google

INDEX TO DECISIONS.

OCTOBER, 1908, TO OCTOBER, 1909.

ALABAMA GROCERY CO. v. FIRST NATIONAL BANK OF ENSLEY, 48 So. 340 (Ala. June 30, 1908. Rehearing denied Jan. 14, 1909), July Quar., p. 279a, No. 1142.

AMERICAN NAT. BANK v. FOUNTAIN, 62 S. E. 738 (N. C. Oct. 28, 1908), p. 249a, No. 1134.

ANDREWS ET AL. v. NORTHWESTERN NATIONAL BANK, 117 N. W. 621 (Minn. Aug. 28, 1908), Jan. Quar., p. 127a, No. 1115.

ARND v. HECKERT, 70 A. R. 416 (Md. Jan. 24, 1908), Jan. Quar., p. 102a.

BACIGALUPO v. BARRILLI, 112 N. Y. S. 1040 (N. Y. Nov. 24, 1908), April Quar., p. 257a.

BANK OF GUNTERSVILLE v. JONES COTTON CO., 46 S. R. 971 (Ala. April 16, 1908. Rehearing denied June 18, 1908), Jan. Quar., p. 126a, No. 1114.

BANK OF MOREHEAD v. HERNIG ET AL., 69 A. R. 679 (Pa. March 2, 1908), Oct. Quar., p. 15a, No. 1086.

BECKER v. HART, 113 N. Y. Sup. 1053 (N. Y. Dec. 1908), July Quar., p. 293a, No. 1167.

BENTLEY v. BROSSARD ET AL., 94 P. R. 736 (Utah March 6, 1908), Oct. Quar., p. 75a, No. 1094

BICK v. CLARK ET AL., 114 S. W. 1144 (Mo. Dec. 29, 1908), April Quar., p. 242a.

BLAKE v. HAMILTON DIME SAVINGS BANK CO., 87 N. E. 73 (Ohio Dec. 22, 1908), July Quar., p. 288a, No. 1155.

BLANCHARD v. BLANCHARD, 113 N. Y. Sup. 882 (N. Y. Dec. 22, 1908), July Quar., p. 287a, No. 1154.

BUTCHER ET AL. v. BUTLER ET AL., 114 S. W. 564 (Mo. Oct., 1908), July Quar., No. 1164.

BUZZELL v. TOBIN, 86 N. E. 923 (Mass. Jan. 7, 1909), April Quar., p. 263a.

CARNEY v. MATTHEWSON ET AL., 109 S. W. 1024 (Ark. April 13, 1908), Oct. Quar., p. 57a.

CHARNOCK v. JONES ET AL., 115 N. W. 1072 (S. D. April 9, 1908), Oct. Quar. No. 1095.

CITY NATIONAL BANK OF COLUMBUS, OHIO, v. JORDAN ET AL., 117 N. W. 758 (Iowa Sept. 29, 1908), April Quar., p. 253a, No. 1136.

CITIZENS' SAVINGS BANK OF COLUMBUS, OHIO, v. HALSTEAD ET AL., 84 N. E. 1098 (Ind. June 9, 1908), Jan. Quar., p. 97a, No. 1102.

COALING COAL AND COKE CO. v. HOWARD ET AL., 61 S. E. 987 (Ga. July 15, 1908), Jan. Quar., p. 92a, No. 1100.

COLE BANKING CO. v. SINCLAIR ET AL., 98 P. R. 411 (Utah Nov. 19, 1908), p. 251a, No. 1135.

CONSOLIDATED NAT. BANK OF NEW YORK v. FIRST NAT BANK OF MIDDLETOWN, 114 N. Y. Sup. 308 (N. Y. Dec. 30, 1908), July Quar., p. 289a, No. 1159.

COX v. CLINE ET AL., 117 N. W. 48 (Iowa July 9, 1908), Jan. Quar., p. 122a, No. 1112.

Digitized by Google

DAVENPORT v. NATIONAL BANK OF COMMERCE IN NEW YORK, 112 N. Y. S. 291 (N. Y. June 18, 1908), Jan. Quar., p. 130a, No. 1116.

DEHOUST v. LEWIS, 112 N. Y. S. 559 (N. Y. Oct. 16, 1908), April Quar., p. 210a, No. 1127.

DUGANE v. HVEZDA POKROKU NO. 4, 119 N. W. 141 (Iowa, Jan. 14, 1909), July Quar., No. 1161.

ELGIN CITY BANKING CO. v. HALL ET AL., 108 S. W. 1068 (Tenn. Oct. 19, 1907), Oct. Quar., p. 7a, No. 1082.

ELLIOTT v. BRADY ET AL., 85 N. E. 69 (N. Y. May 19, 1908), Jan. Quar., p. 120a, No. 1111.

ELLIS v. STATE, 119 N. E. 1110 (Wis. March 9, 1909), July Quar., No. 1146.

EVANS v. M. C. LILLY CO., 48 So. 612 (Miss. March 8, 1909), July Quar., No. 1151.

FEIGENSPAN v. McDONALD, 87 N. E. 624 (Mass. March 1, 1909), July Quar., No. 1144.

FIRST NAT. BANK OF OWENTON v. GREENE ET AL., 114 S. W. 322 (Ky. Dec. 16, 1908), July Quar., No. 1165.

FIRST NAT. BANK OF POMEROY, IOWA, v. BUTTERY, 116 N. W. 341 (N. D. Feb. 11, 1908. On rehearing May 12, 1908), Oct. Quar., p. 1a, No. 1080.

FIRST NAT. BANK OF WAPAKONETA v. BROTHERTON ET AL., 84 N. E. 794 (Ohio April 14, 1908), Oct. Quar., No. 1096.

FIRST STATE BANK OF PLEASANT DALE v. BORCHERS, 120 N. W. 142 (Neb. Feb. 20, 1909), July Quar., No. 1147.

FIRST STATE BANK OF SCOTT CITY v. VOGELI, 96 P. R. 490 (Kan. June 8, 1908), Jan. Quar., p. 116a, No. 1109.

FIRST NAT. BANK OF HAZARD v. BARGER ET AL., 115 S. W. 726 (Ky. Jan. 22, 1909), July Quar., No. 1170.

FISHER MACHINE WORKS CO. v. LEAVENWORTH NAT. BANK, 94 P. R. 124 (Kan. Feb. 8, 1908), Oct. Quar., p. 25a.

FORBES v. FIRST NAT. BANK OF ENID, 95 P. R. 785 (Okla. May 15, 1908), Oct. Quar., p. 35a, No. 1089.

FRED RUEPING LEATHER CO. v. WATKE, 116 N. W. 174 (Wis. May 8, 1908), Oct. Quar., p. 14a, No. 1085.

FULLER v. CHENAULT, 47 S. R. 197 (Ala. June 16, 1908. Rehearing denied July 3, 1908), Jan. Quar., p. 171a.

GILPIN v. SAVAGE, 112 N. Y. S. 802 (N. Y. Oct. 30, 1908), April Quar., p. 188a, No. 1118.

GRAHAM v. SMITH, 118 N. W. 726 (Mich. Dec. 14, 1908), April Quar., p. 212a, No. 1128.

HACKLEY NAT. BANK OF MUSKEGON v. BARRY ET AL., 120 N. W. 275 (Wis. March 9, 1909), July Quar., p. 286a, No. 1152.

HADDOCK, BLANCHARD & CO., INC., v. HADDOCK, 85 N. E. 682 (N. Y. Sept. 29, 1908), April Quar., p. 191a, No. 1119.

HAMITER v. BROWN, 113 S. W. 1014 (Ark. Nov. 16, 1908), April Quar., p. 224a.

HAMMOND SNYDER & CO. v. AMERICAN EXPRESS CO., 68 A. R. 496 (Md. Jan. 8, 1908), Oct. Quar., p. 58a.

HARLOW ET AL. v. PARSONS LUMBER AND HARDWARE CO., 71 A. R. 734 (Conn. Jan. 22, 1909), April Quar., p. 264a.

HARMON v. OLD DETROIT NAT. BANK, 116 N. W. 617 (Mich. May 26, 1908), Oct. Quar., p. 3a, No. 1081.

HERMANN'S EX'R v. GREGORY ET AL., 115 S. W. 809 (Ky. Feb. 4, 1909), July Quar., No. 1169.

HOROWITZ v. WOLLOWITZ ET AL., 110 N. Y. S. 972 (N. Y. June 3, 1908), Oct. Quar., p. 19a, No. 1088.

Digitized by Google

HUSTON ET AL. v. NEWGASS ET AL., 84 N. E. 910 (Ill. April 23, 1908. Rehearing denied June 3, 1908), Oct. Quar., p. 11a, No. 1084.

HOUGH AVE. SAVINGS AND BANKING CO. v. ANDERSON, 85 N. E. 498 (Ohio June 26, 1908), Jan. Quar., p. 98a.

HUNTER v. BACON, 111 N. Y. S. 820 (N. Y. July 8, 1908), Jan. Quar., p. 95a, No. 1101.

INDIANA FUEL SUPPLY CO. v. INDIANAPOLIS BASKET CO., 84 N. E. 776 (Ind. May 14, 1908), Oct. Quar., p. 80a.

IN RE ELLARD ET AL., 114 N. Y. Sup. 827 (N. Y. Jan. 21, 1909), July Quar., No. 1173.

IOWA MFG. CO. v. B. F. STURTEVANT CO. (No. 2,705), 162 Fed. Rep. 460 (U. S. May 25, 1908), Jan. Quar., p. 178a.

JENNINGS v. LAW, 85 N. E. 157 (Mass. May 22, 1908), Jan. Quar., p. 107a, No. 1105.

JOHNSON COUNTY SAVINGS BANK v. KRAMER, 86 N. E. 84 (Ind. Nov. 24, 1908), April Quar., p. 209a, No. 1126.

JOHNSON COUNTY SAVINGS BANK v. KEMP MERCANTILE CO., 114 S. W. 402 (Tex. Dec., 1908), July Quar., p. 293a, No. 1166.

JONES ET AL. v. JACKSON, 110 S. W. 215 (Ark. April 27, 1908), Oct. Quar., p. 41a, No. 1091.

J. W. O'BANNON CO. v. CURRAN, 113 N. Y. S. 359 (N. Y. Dec. 11, 1908), April Quar., p. 213a, No. 1129.

J. W. PERRY CO. v. TAYLOR BROS. ET AL., 62 S. E. 423 (N. C. Sept. 30, 1908), April Quar., p. 248a, No. 1133.

KELLY v. BEERS ET AL., 86 N. E. 980 (N. Y. Jan. 5, 1909), July Quar., No. 1157.

KELLY v. BEERS ET AL., 86 N. E. 985 (N. Y. Jan. 5, 1909), July Quar., No. 1158.

KENNEY v. HARLEM SAVINGS BANK, 114 N. Y. Sup. 749 (N. Y. Nov., 1908), July Quar., No. 1162.

KESSLER ET AL. v. ARMSTRONG CORK COMPANY, 158 Fed. Rep. 744 (Dec. 4, 1907), Jan. Quar., p. 159a.

KINSTON COTTON MILLS v. KUHNE ET AL., 113 N. Y. S. 779 (N. Y. Dec. 18, 1908), April Quar., p. 206a, No. 1125.

KIPP v. SMITH, 118 N. W. 848 (Wis. Dec. 15, 1908), July Quar., p. 274a, No. 1139.

KRAMER ET AL. v. GRANT, 111 N. Y. S. 709 (N. Y. June 30, 1908), Jan. Quar., p. 111a, No. 1107.

LANNING v. JOHNSON ET AL., 69 A. R. 490 (N. J. April 2, 1908), Oct. Quar., p. 39a, No. 1090.

LIVINGSTAIN v. COLUMBIA BANKING & TRUST CO., EX PARTE BERGER, 62 S. E. 249 (S. C. Sept. 3, 1908), Jan. Quar., p. 124a, No. 1113.

LUCKENBACH v. McDONALD. SAME v. KUNZIG, 164 Fed. Rep. 296 (Pa. Oct. 9, 1908), April Quar., p. 197a, No. 1121.

MACAULEY v. HOLSTEN, 114 N. Y. Sup. 611 (N. Y. Jan., 1909), July Quar., p. 292a, No. 1163.

MANUFACTURER'S COMMERCIAL CO. v. BLITZ, 115 N. Y. Sup. 402 (N. Y. March 5, 1909), July Quar., p. 281a, No. 1148.

MARLING v. FITZGERALD, 20 N. W. 388 (Wis. Feb., 1909), July Quar., p. 295a, No. 1171.

MARLING v. JONES, 119 N. W. 931 (Wis. Feb. 16, 1909), July Quar., p. 280a, No. 1143.

McNEELY CO. v. BANK OF NORTH AMERICA, 70 A. R. 891 (Pa. June 2, 1908), April Quar., p. 198a, No. 1122.

MERCANTILE BANK OF MEMPHIS v. BUSBY ET AL., 112 S. W. 390 (Tenn. Sept. 30, 1908), April Quar., p. 243a, No. 1132.

Digitized by Google

MERCHANTS BANK OF VALDOSTA v. BAIRD, 160 Fed. Rep. 642 (U. S. March 2, 1908), Oct. Quar., p. 29a.

MILMO NAT. BANK v. COBBS, 115 S. W. 345 (Texas Dec. 16, 1908). Rehearing denied Jan. 20, 1909), April Quar., p. 126a.

MOHR v. RICKGAUER, 117 N. W. 950 (Neb. Oct. 8, 1908), April Quar., p. 196a, No. 1120.

NATIONAL PARK BANK v. SAITTA, 111 N. Y. Supp. 927 (N. Y. July 8, 1908), Jan. Quar., p. 85a, No. 1098.

NORWOOD ET AL. v. LEEVES, 115 S. W. 53 (Tex. Jan., 1909), July Quar., p. 286a, No. 1153.

ONSTOTT. v. OGLE ET AL., 84 N. E. 1059 (Ill. April 23, 1908), Jan. Quar., p. 155a.

PACKARD ET AL. v. FIGLIUOLO, 114 N. Y. Sup. 753 (N. Y. Feb. 5, 1909), July Quar., No. 1172.

PENFIELD INV. CO. v. BRUCE, 111 S. W. 888 (Mo. June 8, 1908. Rehearing denied June 29, 1908), Jan. Quar., p. 88a, No. 1099.

PEOPLES v. GORHAM, 99 Pac. 399 (Cal. Nov. 14, 1908), July Quar., p. 272a, No. 1138.

REILLY v. McKINNON. RYNKIEVICZ v. SAME, 159 Fed. Rep. 78 (U. S. Feb. 5, 1908), Oct. Quar., p. 72a, No. 1093.

REPUBLIC LIFE INS. CO. v. HUDSON TRUST CO., 115 N. Y. Supp. 503 (N. Y. March 5, 1909), July Quar., No. 1145.

RICE v. BARRINGTON, 70 A. R. 169 (N. J. June 15, 1908), Oct. Quar., p. 101a, No. 1103.

RIECK v. DAIGLE, 117 N. W. 346 (N. D. June 19, 1908), Jan. Quar., p. 106a, No. 1104.

ROBINSON v. MUTUAL SAVINGS BANK OF SAN FRANCISCO ET AL. (Civ. 411), 95 P. R. 533 (Cal. March 5, 1908. Rehearing denied April 2, 1908), Oct. Quar., p. 17a, No. 1087.

ROBINSON v. BANK OF WINSLOW, 85 N. E. 793 (Ind. Oct. 13, 1908), April Quar., p. 204a, No. 1124.

ROESSLE v. LANCASTER, 114 N. Y. S. 387 (N. Y. Jan. 8, 1909), April Quar., p. 234a.

SCARBROUGH v. CITY NAT. BANK, 48 So. 62 (Ala. Dec., 1908), July Quar., p. 291a, No. 1160.

SEABOARD NATIONAL BANK v. BANK OF AMERICA, 85 N. E. 829 (N. Y. Oct. 6, 1908), April Quar., p. 218a.

SHELTON IMPLEMENT CO. v. SCHIECK ET AL., 116 N. W. 951 (Neb. June 4, 1908), Jan. Quar., p. 118a, No. 1110.

SNYDER v. CORN EXCH. NAT. BANK, 70 A. R. 876 (Pa. June 2, 1908), April Quar., p. 183a, No. 1117.

STANDARD SUPPLY CO. v. CARTER & HARRIS, 62 S. E. 150 (S. C. Aug. 13, 1908), Jan. Quar., p. 173a.

START v. TUPPER, 69 A. R. 151 (Vt. March 2, 1908), Oct. Quar., p. 55a.

STATE v. HAMMELSY, 96 P. R. 865 (Oregon July 28, 1908), Jan. Quar., p. 153a.

STATE BANK OF GOTHENBURG v. CARROLL ET AL. (No. 15,137), 116 N. W. 276 (Neb. April 23, 1908), Oct. Quar., p. 70a, No. 1092.

STIRES ET AL. v. FIRST NAT. BANK OF COLUMBUS, 119 N. W. 258 (Neb. Jan. 9, 1909), July Quar., No. 1168.

SYKES ET AL. v. CITIZENS NAT. BANK OF DES MOINES, IOWA, 98 P. R. 206 (Kansas Nov. 7, 1908), p. 258a.

THE NAT. EXCHANGE BANK OF ALBANY v. WILLIAM LESTER, 87 N. E. 779 (N. Y. March 5, 1909), July Quar., p. 269a, No. 1137.

TILDEN v. GOLDY MACH. CO., 98 P. R. 39 (Cal. Sept. 10, 1908), April Quar., p. 214a, No. 1130.

TITLE GUARANTEE & TRUST CO. v. HAVEN ET AL., 111 N. Y. S. 305 (N. Y. June 5, 1908), Jan. Quar., p. 149a.

Digitized by Google

TOMBIGBEE VALLEY R. CO. v. FAIRFORD LUMBER CO., 47 S. R. 88 (Ala. May 14, 1908. Rehearing denied June 18, 1908), Jan. Quar., p. 133a.

TRUST CO. OF AMERICA v. HAMILTON BANK OF NEW YORK CITY, 112 N. Y. S. 84 (N. Y. July 8, 1908), Jan. Quar., p. 112a, No. 1108.

TRUST CO. OF AMERICA v. HAMILTON BANK OF NEW YORK CITY (N. Y. July, 1908), Oct. Quar., p. 21a.

TUMLIN v. BRYAN, 165 Fed. 166 (U. S. Nov. 10, 1908), July Quar., No. 1141.

UNION TRUST CO. v. HASSELTINE, 86 N. E. 777 (Mass. Jan. 5, 1909), July Quar., No. 1156.

UNITED STATES EXCH. BANK v. ZIMMERMAN, 113 N. Y. S. 33 (N. Y. Nov. 24, 1908), April Quar., p. 256a.

VAN NORDEN TRUST CO. v. L. ROSENBERG, INC., 114 N. Y. Sup. 1025 (N. Y. Feb. 15, 1909), July Quar., p. 283a, No. 1150.

VOGEL v. STARR, 112 S. W. 27 (Mo. June 29, 1908), Jan. Quar., p. 109a, No. 1106.

VOSS v. CHAMBERLAIN ET AL., 117 N. W. 269 (Iowa July 9, 1908), Jan. Quar., p. 142a.

WALTERS v. ROCK, 115 N. W. 511 (N. D. Feb. 21, 1908), Oct. Quar., p. 64a.

WARD v. CITY TRUST CO. OF NEW YORK ET AL., 84 N. E. 585 (N. Y. April 14, 1908), Oct. Quar., p. 43a.

WATTS MERCANTILE CO. v. BUCHANAN ET AL., 46 A. R. 60 (Miss. April 13, 1908), Oct. Quar., p. 10a. No. 1083.

WESTERN LOAN AND SAVINGS CO. v. THIBODEAU ET AL., 159 Fed. Rep. 370 (U. S. Feb. 3, 1908), Oct. Quar. No. 1097.

WHITWELL v. WRIGHT, 115 N. Y. Sup. 48 (N. Y. Feb. 3, 1909), July Quar., p. 277a, No. 1140.

WOLSTENHOLME v. SMITH ET AL., 97 P. R. 329 (Utah April 14, 1908), April Quar., p. 201a, No. 1123.

ZIMBLEMAN & OTIS v. FINNEGAN, 118 N. W. 312 (Iowa Nov. 19, 1908), April Quar., p. 216a, No. 1131.

ZOLLMAN v. JACKSON TRUST & SAVINGS BANK, 87 N. E. 297 (Ill. Feb. 19, 1909), July Quar., p. 283a, No. 1149.

Digitized by Google

CURRENT BUSINESS LAW

AFFECTING THE

BANKER AND MERCHANT.

FROM THE REPORTS OF THE HIGHEST COURTS OF THE SEVERAL STATES.

J. S. McMASTER,

EXAMINER, N. Y. STATE BANK DEPARTMENT

Bills and Notes: Negotiability: Waiver of Protest: Consent to Extension.

The plaintiff, First National Bank of Pomeroy, Iowa, was the holder of a promissory note, in effect the same as the illustration, and it sued the maker, J. K. Buttery. Judgment was rendered for the defendant Buttery, upon the ground that there was a failure of consideration as between the payee and the maker, and because the note was not a negotiable note, the holder took subject to the defences which the maker might have. The trial court held the note to be non-negotiable for the reason that it was provided "that the makers and indorsers herein severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice." The Supreme Court of North Dakota held that this did not render the note non-negotiable, and if the plaintiff was an innocent holder for value, having acquired the same before maturity, it could recover. It must be borne in mind that this decision does not affect the well-known principle of law, that an agreement to extend the time of payment of a note without the assent of the person secondarily liable, releases the person secondarily liable. This decision simply holds that a provision such as the above does not render the note non-negotiable.

The court said in part:

"It is strenuously argued that the use of the word 'makers' in the waiver admits of an extension being made at any time on the part of the holder, by a mere secret mental process, unknown to any other party. This may be true as a psychological fact, but we do not

Digitized by Google

deem it so as a matter of practice in commerce and banking. To us it is clear that it has the same effect as though the note read 'on the 1st day of October, 1903, or thereafter on demand,' in which case there would be no question of its negotiability. Holders of notes do not by a secret mental process make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers. This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word 'makers' is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable thereon under certain contingencies as makers. 7 Cyc. 614. This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of the time renders the instrument non-negotiable. We feel that the reasoning in the National Bank of Commerce v. Kenney, (Tex. Sup.) 83 S. W. 368, is not only satisfactory, but conclusive of this point. The note involved in that case contained this provision: 'The makers and indorsers hereof hereby severally waive protest, demand, and notice of protest and non-payment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity, without prejudice to the holder.' In holding that this provision did not render the note non-negotiable, the Texas court says:

"'If, as is argued, the effect of the stipulation is to give the right to the maker, without the consent of the holder, or to the holder without the consent of the maker to appoint another date of payment, and thereby extend the time, it may be that it would render the instrument non-negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It simply makes a provision in case the time of payment may be extended. How extended? It seems to us that the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the stipulation taken as a whole was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties on the paper. Therefore, what was meant by the stipulation as to extension of time was simply that in case the holder and maker should agree upon an extension the sureties and indorsers should not be discharged. The holder and maker of a note may at any time agree upon an extension; therefore, the fact that they have that right does not affect the negotiability of the paper. It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable on or before a certain date is negotiable. The maker of such a note has the right to pay before the date named.

Digitized by Google

Bills and Notes: Negotiable Note: Provision for Extension of Time.

$ 1000.00/100 Grand Forks, N. D., June 1, 19 03

On or before Oct. 1, 1903 after date I promise to pay

to the order of John Sylvester

One thousand and----------no/100 Dollars

Payable at The Security National Bank, Sioux City, Iowa

Value received The makers and indorsers herein severally waive presentment of payment, and notice of protest, and consent that the time of payment may be extended without notice.

No. Due

J. K. Buttery.

COLUMBIA BOND

Digitized by Google

Pay to the order of
First National Bank
of Pomeroy Iowa.
John Sylvester

First National Bank
of Pomeroy, Iowa.
by James Cantine
Cashier.

First National Bank of Pomeroy, the indorsee of this note, was an innocent holder for value, having acquired the instrument before its maturity. It sued the maker, J. K. Buttery, and judgment was rendered against it, the trial court holding that the note was a non-negotiable note, and there was a failure of consideration, therefore the First National Bank was in no better position than the payee, who had indorsed the note to the order of the First National Bank. The note contains a provision "that the makers and indorsers herein severally waive presentment of payment and notice of protest and consent that the time of payment may be extended without notice." The Supreme Court of North Dakota, in reversing the judgment of the trial court, held that this provision did not render the instrument non-negotiable. The Negotiable Instruments Law which is in effect in the State of North Dakota provides that a negotiable instrument must be payable at a fixed or determinable future time or payable on demand, and that an instrument, in which no time of payment is expressed, is discharged against the person secondarily liable thereon. The Negotiable Instruments Law also provides that it is discharged by any agreement binding upon the holder to extend time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable or unless the right to recourse against such party is expressly reserved. It will be observed that the holder and the maker may agree to extend the time of payment, but it must be done with the assent of the person secondarily liable, or he will be released. The fact that a note provides that the holder and the maker may agree to extend the time of payment without notice, does not necessarily render the note non-negotiable because the note is payable at a fixed or determinable time and the holder may demand payment at that time. However, if the holder and maker do actually agree in accordance with the terms of the instrument to extend the time of payment without notifying the person secondarily liable, the person secondarily liable would be released.

Digitized by Google

but the holder cannot demand payment before that date. So, in this case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that if the holder has the absolute right to demand payment at a certain date, the note is negotiable. This is but an ilustration of what we understand to be the general rule. There being nothing in the stipulation under consideration which gave any one the right to demand of the holder of the note an extension of the time of payment, we think the time at which he could demand payment was fixed, and that, therefore, it was a negotiable note.'

"We are, however, of the opinion that, under the plain terms of the Negotiable Instruments Act of this State, this note is negotiable, without reference to other authority. Section 6486, Revised Codes 1905, defines a negotiable promisory note as follows: 'A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a certain sum of money, to order or to bearer.' Section 6309 provides that an instrument is 'payable on demand. . . . 2. In which no time for payment is expressed.' Section 6422 provides how such an instrument is 'discharged against a person secondarily liable thereon.' Paragraph 6 thereof provides that it is discharged by any agreement binding upon the holder to extend time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right to recourse against such party is expressly reserved. If, as is contended by the respondent in the case at bar, this instrument, taken as a whole, expresses no time for payment, then, under section 6309, it is an instrument payable on demand, and according to section 6486 the negotiability of a promissory note is not destroyed by its being made payable on demand. On the other hand, if it does express a time for payment, the 1st day of October, 1903, is a fixed and determinable future time as required by section 6486, supra. This note was executed and dated within this State, and we are satisfied that the paragraph complained of as rendering it non-negotiable was drawn for the express purpose of protecting it within the terms of paragraph 6, § 6422, above quoted, and in accordance with other statutory provisions providing for a waiver of presentment, notice of dishonor, and protest. Notes contaning clauses similar to the one in question have been in almost universal use in this State for years, and the identical waiver complained of has been in common use, and the instruments containing them have been regarded and treated by the trade and bankers as negotiable."

See Decision No. 1080.

Banks and Banking: Forgery: Identification of Payee.

The plaintiff, Judson Harmon, is the receiver of the Pere Marquette Railroad Company, and the defendant was one of the banks in which the said railroad had funds on deposit which were paid out upon

Digitized by Google

warrants issued by the company. The railroad company issued a warrant to the Sunday Creek Coal Company for $2,097.38 in payment of an indebtedness of the railroad company to the coal company. Part of the warrant read as follows: "Pere Marquette Railroad Company, Dr., to the Sunday Creek Coal Co. (Pay W. N. Cott, Treas.), Columbus, O. Made 5/31/05, Dept. No. 6706, April. For coal per attached statement, $2,097.38." A clerk in the office of the auditor of disbursements of the railroad company fraudulently changed the name of the payee of the warrant so that the voucher read "The G. E. Fairbanks Coal Co. Pay G. E. Fairbanks, Treas., 407 Able Bldg., Cor. 63 St. Stewart Ave., Chicago, Ill.," instead of the "Sunday Creek Coal Co., Pay W. N. Cott, Treas., Columbus, O." The new warrant, which was issued, was made payable to the G. E. Fairbanks Coal Company. The warrant was cashed by a Denver bank, and passing through severl banks, was finally paid by the defendant bank, having been presented through the Detroit Clearing House. The defendant bank paid the warrant in the usual course of business. The theory of the plaintiff in its action against the bank was that the indorsement was a forgery and that no title to funds passed through a forgery. The plaintiff, the receiver of the railroad, asked the court to direct the jury for a verdict in his favor, but the case was submitted to the jury and the jury decided it in favor of the defendant. The defendant appealed and the verdict was reversed. There is no question but that both the railroad company and the bank were acting in good faith. The Supreme Court of Michigan held that the defendant had the burden of proof to show the existence or non-existence of the payee named in the warrant and that the Denver bank took the proper means to identify the payee. The Denver bank was of course the agent of the Detroit bank in cashing the warrant, and there was no evidence offered to show that the Denver bank made any investigation as to the identity of the payee. The payee was either a fictitious person or a real person. If the payee was a fictitious person, the general rule of law which makes a check payable to a fictitious person payable to bearer would not apply here, for the reason that in order to make this rule applicable the check must be drawn with the knowledge on the part of the maker that it is drawn to a fictitious person. In this case the knowledge of the maker that the check was drawn to a fictitious party was not proved. The indorsement in the name of a fictitious party is a forgery unless the instrument was drawn with the knowledge of the maker that the payee was a fictitious payee. On the other hand, if the payee named in the warrant were a real entity, the indorsement by any other person would be a forgery, and it was incumbent upon the defendant bank to show that it paid the warrant to the party to whom it was made payable. The fact that the warrant was paid by the Denver bank would not excuse the

Digitized by Google

Detroit bank from making this proof, for the reason that the Denver bank was the agent of the Detroit bank in this matter and the Detroit bank should have satisfied itself of the genuineness of the instrument before paying it when it was transmitted to it for payment.

The court said in part:

"If the payee named in this voucher, the G. E. Fairbanks Coal Company, pay G. E. Fairbanks, treasurer, had been presented to the defendant by one claiming to be G. E. Fairbanks, the treasurer of the Fairbanks Coal Company, would the defendants have been protected in payment without any investigation to determine the identity of the presenter with the payee named in the warrant? It seems to to us clear that it would not. The same rule must apply when the warrant or check is presented to it, coming through other banks. If the drawer chooses to rely upon the identification by the bank which cashed the check, it does so at its own risk, and its recourse is upon that or some intermediate bank. If the G. E. Fairbanks Coal Company was a fictitious payee, the bank cannot defend under the statute (Comp. Laws, § 4870) that the check was payable to bearer. That statute applies only to cases where the drawer knowingly draws the check to the order of a fictitious payee. Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Shipman v. Bank, etc., of N. Y., 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131; Chism v. First National Bank, 96 Tenn. 649, 316 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; Murphy v. Metropolitan Nat. Bank, 191 Mass. 59, 77 N. E. 693, 114 Am. St. Rep. 595; 2 Bolles, Modern Law of Banking, 716; 7 Cyc. 564. In Shipman v. Bank it is said: 'We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person,' citing authorities. But the drawee's duty to use diligence in identifying the payee of the check or warrant is not changed by the time and place of the forgery. This is not the case of United States v. National Exchange Bank, (C. C.) 45 Fed. 163. In that case the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was of course with the drawer, and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee. It was held in Roberts v. Tucker, 16 Q. B. 560: 'That a banker cannot debit his customer with the payment made to one who claims through a forged indorsement, and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position so as to preclude the customer from showing it to be

Digitized by Google

forged.' It is held in Murphy v. Metropolitan Nat. Bank, supra: 'The ordinary rule is well established that a banker on whom when a check is drawn must ascertain at his peril the identity of the person named in it as payee. It is only when he is misled by some negligence or other fault of the drawer that he can set up his own mistake in this particular against the drawer,' citing authorities. In this case the defendant took no precaution before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein. It evidently relied upon the identification made by the bank in Denver, Colo., where the warrant was cashed, and whether that bank took the requisite precaution we do not know. It would naturally excite suspicion that a check drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit, should be presented to a bank in the distant city of Denver. It is clearly the duty of the Denver bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee. 2 Morse on Banking, § 466 (b); Ellis & Morton v. Ohio Life Insurance Co., 4 Ohio St. 628, 64 Am. Dec. 610. The court in that case said: 'Where negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of parties, or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument.' The negligence of the Denver bank is imputable to the defendant. In Graves v. American Exchange Bank, 17 N. Y. 205, a draft was sent payable to order of Charles F. Graves. It reached a person in the same place by the same name, and by him was indorsed and paid by the drawee. It was held that the payment, although made in good faith, did not divest or impair the title to the true owner who had not seen or indorsed the paper. It was held in fact to be a forged indorsement. It was held in Third National Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475, 27 N. Y. Supp. 1070, that it is the signature of the payee that transfers title to a check, that the signature of another person by the same name as the one to whom it was drawn is just as much a forgery as if the names had been different. It is the signature of the payee that transfers title to the check. A similar holding is in Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85. It was held in First Nat. Bank of Chicago v. Pease, 168 Ill. 40, 48 N. E. 160, that the fact that the drawer of a check delivers it to a party representing himself as the payee's agent, without investigating the alleged agent's authority, is not such negligence as will relieve the bank from liability for the payment of the check on a forged indorsement of the payee's name by the alleged agent. If the payee named in the paid warrant was a fictitious person, the indorsement in the name of such fictitious party is in effect a forgery. Hatton v. Holmes, supra. If the G. E. Fairbanks Coal Company and G. E. Fairbanks, treasurer, were fictitious parties, the indorsement was a forgery. If they were real parties, the indorsement by any other without authority would be a forged indorsement and would not excuse defendant's payment. It was incumbent upon it to show the existence or non-existence of such a payee, and that

Digitized by Google

$400.00/100

Cleveland, Tenn., Oct., 1st, 1903.

On or before the first day of September, 1905, for value received, we jointly and severally promise to pay to the order of Dunham, Fletcher & Coleman of Wayne, Ill., four hundred and 00/100 Dollars, payable at the Cleveland National Bank, with interest at 5 per cent per annum, payable annually from date, until paid.

Jeff Hall
C. J. Carroll Jr
L. L. Callaway
L. P. Sullivan
J. J. McKamy
Edward H. Thurston

Digitized by Google

Pay to the order of W. S. J. B. & B. Dunham without recourse to us

Dunham, Fletcher & Coleman

W. S. J. B. & B. Dunham

For value received, we hereby guarantee, the payment of the within note at maturity or at any time thereafter with interest at 5-1/2 per cent. per annum until paid, and we agree to pay all the costs and expenses paid or incurred in collecting the same hereby waiving demand of payment and notice of non-payment.

W. S. J. B. & B. Dunham

The point upon which this case turns is whether or not the indorsee and holder of this note, the Elgin City Banking Company, is a holder for value. The Elgin City Banking Company sued the makers, whose names appear upon the face of the note. It was proved conclusively at the trial that the consideration for this note, which the payees had given to the makers, wholly failed and that there was fraud and misrepresentation in the note. It was also shown that the Elgin City Banking Company, when the note was transferred to it by W. S., J. B. & B. Dunham, gave credit to said indorsers for the amount of the note in the First National Bank of Elgin. The Negotiable Instruments Law provides: "Section 59. Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course." It having been proved that the title of the payees and indorsers was defective, the burden of proof shifted to the plaintiff to prove that it was a holder in due course. If the bank had extended credit to the indorsers upon its own books and the credit had not been exhausted, it would not have been a holder for value. The plaintiff contended that, having extended credit to the indorser in another bank, that this fact differentiated this case from the cases which sustain the above theory of law. The court held that the burden of proof being upon the plaintiff to show that it was a holder in due course, it was incumbent upon the plaintiff to show that the credit which had been extended to the indorsers in the First National Bank had been used, and in view of the fact that this was not proved by the plaintiff, the Supreme Court of Tennessee affirmed the judgment of the trial court in favor of the defendants.

Digitized by Google

the Denver bank took the proper means to identify the payee. It failed to sustain the burden, and therefore the verdict and judgment are set aside."

See Decision No. 1081.

Bills and Notes: Holder for Value.

The plaintiff, the Elgin City Banking Company, is the holder of three (3) promissory notes similar to the illustration. The consideration for the notes was a horse sold to the makers by an agent of Dunham, Fletcher & Coleman, the payees. It was proved at the trial that the agent of the payees had misrepresented the qualities of the horse and that it possessed none of the qualities which the agent of the payees represented that it did possess. It was conclusively proved that there was fraud and misrepresentation, and as a consequence the consideration for the note wholly failed. The payees took back the first horse and sent another one which was diseased and which died within two months after its receipt by the makers. It was also shown that the payees' agents induced two men to become the ostensible co-purchasers of the horse with the makers of this note, whereas in fact these two men paid nothing, but received money to become co-purchasers, because the payees knew that these men were well-known horsemen in whom the other purchasers had confidence as to their judgment, and that their becoming co-purchasers with the makers of this note would induce the makers of the note to buy the horse. The principal question involved in this case is as to whether or not the plaintiff, the bank, is a holder for value, the bank having received the note by indorsement. The defendants set up that the fact that the note was indorsed without recourse destroyed its negotiability, and the fact that the note was guaranteed by the indorsers, and that the guarantors, also the indorsers, agreed to pay five and one-half per cent. interest, whereas the note on its face bore five per cent. interest, made a new and different contract, and that this also destroyed the negotiability of the note. These two defenses were passed upon adversely to the contention of the defendants by the Appellate Court, but the Appellate Court held that the plaintiff was not a holder for value for the reason that the consideration for the transfer of the note to the plaintiff bank was a credit extended to the indorsers in another bank. It is a well-known principle of law that when a bank simply credits the amount of a note to an indorser's account, this does not constitute value unless it is also shown that the money has been drawn out by the indorser. The query in this appeal was whether or not the bank, by giving credit to the indorser in another bank, thereby made itself a holder for value,

Digitized by Google

and it was held that the burden of proof was upon the plaintiff bank to show that the credit thus extended was used by the indorsers. The trial court's judgment in favor of defendants was affirmed.

The court said in part:

"It is suggested that the indorsement 'without recourse' was sufficient to put the purchaser upon notice, and destroyed the negotiability of the instrument; but we think it is well settled that an indorsement without recourse is not sufficient to put the purchaser upon notice. 2 Randolph, Commercial Paper, § 1008; 7 Cyc. 954, and numerous cases cited. Moreover, the matter is set at rest by our Negotiable Instruments Law (Acts 1899, p. 148, c. 94, § 38), wherein it is provided that 'such an indorsement does not impair the negotiable character of the instrument.' The determinative question presented on the record is whether the complainant bank is a holder for value. Our Negotiable Instruments Law (section 25) provides: 'Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand, or at a future time.' 'Section 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.' 'Section 52. A holder in due course is a holder who has taken the instrument under the following conditions: "(1) That it is complete and regular upon its face." "(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact." "(3) That he took it in good faith and for value." "(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it."' 'Section 55. The title of a person who negotiates an instrument is defective within the meaning of this act, when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.' 'Section 56. To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.' 'Section 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses, available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.' 'Section 59. Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person, under whom he claims acquired the title as a holder in due course.' While we find some facts and circumstances in the record tending to show that the complainants were put on inquiry as to defenses against this note, we cannot say that complainants 'had actual knowledge of the infirmity or defect or knowledge of such facts that its action in taking the instrument amounted to bad faith.' It is matter for observation that at the time of pur-

Digitized by Google

chasing this paper the officials of the complainant bank made no inquiry in respect of the makers or as to the consideration of the notes, although it is admitted they knew nothing as to the commercial standing or solvency of the makers. Again, it appears that in enforcing the collection of the notes complainant has ignored the guarantors and is only suing the original makers. This is worthy of comment, since the guaranty was for the payment of all expenses of collection and additional interest. It appears the guarantors are solvent and reside within seven miles of complainant's place of business, and yet, passing them, complainant sent his paper to Cleveland, Tenn., for collection, thereby seeking a lower rate of interest and incurring attorney's fees in the prosecution of the suit. There was no obstacle in the way of a primary suit against the guarantors on this form of guaranty. It is well settled in Tennessee that, when the guaranty is absolute, no demand or exhaustion of the maker is required, nor is any notice required of the acceptance or default. It does not matter whether the guaranty stipulates that the maker will pay, or that the guarantor will pay, or whether the maker is solvent or not. In either event, the undertaking is absolute, and the guarantor may pay the amount, or see that it is paid. This is not the case of a guaranty of solvency or collectibility, which requires previous demand and suit. Klein v. Kern, 94 Tenn. 34, 28 S. W. 295, and authorities there cited. The only explanation of this unbusinesslike procedure on the part of complainant bank that the firm of guarantors did a valuable business with the bank and that complainant would do anything to protect them. The main proposition presented by counsel for defendants is that complainant is not a holder of said paper for value within the meaning of our negotiable instrument law. It is said it is not shown that complainant has ever paid anything in money, or the equivalent, for said paper; but the cashier of the bank merely testifies that he gave said firm 'credit for the amount at the First National Bank of Elgin.' It is said it is not shown that said credit was ever used by said indorsers, W. S., J. B. & B. Dunham. The entire testimony on this subject is found in the deposition of A. C. Hawkins, cashier of the complainant, Elgin City Banking Company. He tells of the purchase of said notes, together with sundry other notes, in one lot, from W. S. Dunham, of the firm of W. S., J. B. & B. Dunham, paying therefor the full amount of said notes, with accrued interest to date of purchase, at said bank, in the usual course of business. This was the testimony of the witness on his direct examination, from which it appears that a prima facie case of a holder for value is made out; but, on cross-examination of the witness at a later date, he was asked: 'Q. 4. Do you recall how you paid for them (referring to the notes)?' and he answered, 'I gave them credit for the amount at the First National Bank of Elgin on the 18th day of July, 1904.' It will be observed that the alleged credit was not given in the bank which purchased the notes (the complainant, Elgin City Banking Company), but at a different bank, namely, the First National Bank of Elgin, Ill. The law seems to be settled that, when a bank simply discounts a note and credits the amount thereof on the indorser's account, without paying to them any value for it, it is not enough to constitute such bank a prima facie purchaser for value of the note. Selover, Neg. Inst. Laws, 217;

Digitized by Google

2 Amer. and Eng. Encyc. of Law (2d ed.) 391, 392; Warman v. First Nat. Bank, 185 Ill. 60, 57 N. E. 6, 49 L. R. A. 412. The reason is that the proceeds of the discount may be credited to the bank by making a change of entries on its own books. It is said, however, that this rule of law has no application where the credit to the seller of negotiable paper is given by the purchaser, not on its own books, but in a different bank. It is said the presumption must be, in such case, that the purchaser has paid money, surrendered securities, released an obligation, or itself assumed an obligation in the other bank, in order to secure this credit. The record fails to show why payment of the notes was made in this manner, nor the precise nature of the transaction by which the complainant bank secured credit to the seller in the First National Bank of Elgin for the amount of these discounted notes. It is well settled that a purchaser of commercial paper is a holder for value and in due course of trade, when he 'has given for the note his money, goods, or credit, at the time of receiving it, or has on account of it sustained some loss or incurred some liability.' Nichol v. Bate, 10 Yerg. 429; Kimbro v. Lytle, 10 Yerg. 417, 31 Am. Dec. 585; Bank v. Johnston, 105 Tenn. 521, 59 S. W. 131. As already seen, by section 25 of our Negotiable Instrument Law (Acts of 1899) it is provided: 'Value is any consideration sufficient to support a simple contract.' There is no trouble, therefore, in holding that, if the complainant bank has obtained credit in favor of the seller in a solvent bank for the amount of the discounted paper, that would be a sufficient consideration to constitute the purchaser a holder for value. The difficulty presented arises out of the indefiniteness of the testimony. The witness was not asked by counsel on either side for an explanation of his statement, 'I gave them credit for the amount at the First National Bank of Elgin.' It does not appear from the record that this credit was ever used by W. S., J. B. & B. Dunham. It does not appear how the credit was given, and the court cannot determine, from the unexplained statement of the witness, whether or not the credit was real and substantial. The burden of proof is on complainant to show, on these facts, that it was a holder for value. The fraud that vitiated the original transaction was the conduct of the agent, Campbell, in representing to five of the purchasers that Beard, Hall, and Thurston had become equal partners in the purchase of the horse, when this agent had secretly arranged with these three parties to pay them a consideration to allow the use of their names as purchasers and to release them from the payment of the quota of the purchase money."

See Decision No. 1082.

Corporations: Ultra Vires.

J. A. Buchanan and others, plaintiffs in this action, sued the Watts Mercantile Company on a promissory note executed by it "per S. Q. Donald." The note was given in payment for stock of another corporation. The defendant, Watts Mercantile Company, set up the defense that S. Q. Donald had no authority to execute the note and

Digitized by Google

$3300 ⁰⁰/₁₀₀ Blandensville Ill., July 21 1904.

At Sight Pay to the

Order of John Huston & Co

Three thousand three hundred & ⁰⁰/₁₀₀ Dollars

Value received and charge the same to account of

To Louis M. Irwgass & Co.

No. Chicago Ill. Grindell & Sainty

UNZ & CO., PRINTERS, 24 BROADWAY, NEW YORK.

Drafts: Liability of Partner for Act of Co-Partner.

Digitized by Google

John Huston & Co.

John Huston & Co. were bankers at Blandinsville, at Illinois, and the drawees of this draft, Louis M. Newgass & Co., were engaged in selling horses on commission at Chicago. Grindell & Dainty, the makers, were originally partners, engaged in business in buying horses in the vicinity of Blandinsville and shipping them to Chicago for sale, Grindell being located in Blandinsville and Dainty in Chicago. An account was opened in the firm name by Grindell & Dainty with Huston & Co., and when Grindell would leave for the country to buy horses he would sign a draft leaving the amount and date blank, and when he had bought a car load of horses, he would telephone the plaintiffs, Huston & Co., the amount and the date. The drafts were then filled in by them, and sent to Chicago for payment and the amount was credited to the account of Grindell & Dainty, and Grindell & Dainty checked out the proceeds of the draft to persons from whom they had purchased the horses. All such drafts drawn prior to July 1st, 1904, were paid by Newgass & Co. On July 20th, 1904, a car load of horses were shipped and this draft was drawn on July 21st, 1904, and Newgass & Co. refused to honor the draft and were sued by Huston & Co. A judgment for the defendants was rendered in the trial court, and this was affirmed by the Appellate Court, but the judgment was reversed by the Supreme Court of Illinois. The defendants had written the plaintiffs that they would honor drafts drawn by Grindell & Dainty for horses. The defendants sought to escape liability by showing that the firm of Grindell & Dainty had been dissolved prior to the execution of this draft;; therefore, that the draft was not the draft of Grindell & Dainty. But the Supreme Court of Illinois held that unless the plaintiff Huston & Co. had actual notice of the dissolution of this partnership, the draft would be considered the draft of Grindell & Dainty. It was also held that the acceptor of a bill of exchange becomes primarily liable for its payment and is to be considered the principal debtor; and this is true even if the acceptance is for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it.

Digitized by Google

that the purchase of the stock of this corporation was an ultra vires act on the part of the Watts Mercantile Company. A judgment was rendered in favor of the plaintiff and the defendant appealed. The Appellate Court held that the corporation could not retain the consideration of the promissory note and set up the plea of ultra vires to escape its liability for the consideration.

The court said in part:

"In examining the question as to whether or not this contract was ultra vires, it must be borne in mind that Mr. Buchanan was a private individual. He simply sold his interest in the Watts Mercantile Company, which corporation, it is shown, had been part owner and stockholder in the Elberta Hoop Company, and when it bought from Buchanan it practically owned the Elberta Hoop Company. We are thus drawn to consider the bald proposition whether a corporation, which makes a purchase which it is powerless to make from a private individual who has the power to sell, can set up its own ultra vires to defeat payment, and at the same time hold onto the stuff it got in the contract. The point is made here that, granting all this, still the case should be reversed, because the action was on the note, and not on a quantum valebant; and in support of this the case of Fairly v. Nash, 70 Miss. 193, 12 South. 149, is cited. If this decision applied, and if it would have governed at the time it was delivered, which we do not decide, it could have no force, because it was delivered before section 147, Const. 1890, was in force. However, we need not bother about this, but prefer to plant ourselves, in the particular case before us, on the decisions of various courts, notably, New York, Massachusetts, and Wisconsin, and on the language of the New York court that 'that kind of plunder which holds onto the property, but pleads the doctrine of ultra vires against the obligation to pay for it, has no recognition or support in the laws of this state.' We refer to 2 Cook on Corporations, 1608, and notes. We subscribe to that doctrine in the particular case we have in hand, and, if it be true that the federal courts would hold differently, we respectfully decline to follow them; but we do not think it would be so held in the federal courts on the facts of the case at bar. The view we have taken of this case does not at all affect the advisory opinion in Woodberry v. McClurg, 78 Miss. 836, 29 South. 514, which case had reference to the propriety of a charter being approved by the attorney-general, which charter expressly authorized the purchase of the stock in other corporations.

See Decision No. 1083.

Drafts: Partnership: Liability of Acceptor.

The plaintiff, John Huston and others, constituting the firm of John Huston & Co., were the payees of a draft in effect the same as the illustrated one, and sued the acceptors, Louis M. Newgass & Co. The acceptors, Newgass & Co., were engaged in selling horses

Digitized by Google

on commission in Chicago, while the plaintiffs Huston & Co. were bankers at Blandinsville, Ill. One Isaac Grindell went to Blandinsville, Ill., and engaged in the business of buying horses there and shipping the horses to Chicago to be sold. He opened an account with the plaintiffs, Huston & Co., bankers, and subsequently one John Dainty became a partner of Grindell. Grindell & Dainty were in the habit of drawing drafts on Louis M. Newgass & Co., and their usual method of procedure was for Grindell to go into the country and buy the horses, paying a small amount down for them, and before going out he would sign a draft with the firm name of Grindell & Dainty and leave the amount and the date blank, and when he had bought a car load of horses, he would direct the plaintiffs, Huston & Co., to fill out the amount and credit his account with the amount of the draft. The firm of Newgass & Co. had written previously as follows: "We will honor drafts drawn by Dainty & Grindell, drawn on us for horses, until further notice." When the amount was placed to the credit of the firm of Grindell & Dainty, Grindell checked it out in payment for the horses which he had bought. All the drafts drawn upon Newgass & Co. were paid up to July 1st, the drafts being forwarded to the correspondent of the plaintiff in Chicago. This draft drawn July 21st was for a shipment made July 20th. The draft was drawn for $3,300, whereas it should have been drawn for $2,300, the mistake having been made when Grindell telephoned the amount for which he wished the draft drawn, there being some confusion on the wires or Grindell not speaking plainly. In any event the plaintiff, upon learning the draft was made $1,000 too large, charged the account of Grindell & Dainty with that amount and credited it upon the draft. Newgass & Co. sued them to recover the balance, $2,300. The Supreme Court of Illinois reversed the decision of the Appellate Court, which had affirmed a judgment of the trial court in favor of the defendant. The contention of the defendants was that the firm of Grindell & Dainty having been dissolved prior to the execution of this draft and they, the defendants, having agreed to accept drafts drawn by Grindell & Dainty, they were not liable on this draft drawn when that firm was not in existence. The court held that as Huston & Co. had no notice of the dissolution of the partnership, they could recover.

The court said in part:

"Appellants asked the court to hold as propositions of law that each partner in a commercial partnership has power to bind the other partner in dealing with third persons within the scope of the partnership until notice given of the dissolution of the partnership, and that a notice of dissolution given by one partner to the other has no effect upon the rights of third persons dealing with the partnership without notice of the dissolution: also, that notice of dissolution given by

Digitized by Google

Dainty to Grindell was inoperative as to all persons with whom the firm of Grindell & Dainty had been doing business prior to the dissolution, unless those persons had knowledge of the dissolution. These propositions were refused, and in this we think the court erred. Here the firm of Grindell & Dainty was a trading partnership, and either of the partners had the right to sign the firm name to obligations or negotiable paper within the legitimate scope of the partnership business. It would hardly be denied that if Grindell had signed the firm name to a promissory note payable to appellants at the time he signed it to the draft the firm would have been liable in an action to recover on the note. Under the circumstances disclosed by the evidence in this case, appellants were warranted in dealing with Grindell as a member and representative of the firm. Appellees had some acquaintance with Grindell, but were unwilling to extend their credit to him alone. They were well acquainted with Dainty and sustained close relations with him, and their agreement to accept and pay drafts drawn by Grindell & Dainty was on account of their knowledge of and faith in Dainty. This, together with the profits they expected to derive from commissions on the sales of horses shipped them by Grindell & Dainty, induced them to agree with the appellants to pay their drafts. But for this agreement of appellees, appellants would not have furnished the money to Grindell & Dainty to pay for the horses. Appellees' agreement was to honor the drafts drawn on them by Grindell & Dainty for horses until further notice. It would seem consonant with both reason and justice that so long as appellants were justified in advancing the money to pay for horses on drafts drawn in the name of the partnership, appellees would be liable for the payment of the drafts until they had given notice to the contrary or appellants had received notice of the dissolution of the firm. It was certainly their duty, when they received knowledge of the dissolution of the firm of Grindell & Dainty, to have protected themselves as well as appellants by notifying appellants of the fact and that they withdrew their agreement to honor further drafts if any such were drawn. Appellees' failure to so notify appellants was inexcusable negligence under the facts in this case. The quiet withdrawal of Dainty from the firm without notice to appellants would, we think, no more relieve appellees from liability than it would have relieved Dainty if the action had been brought against the partnership, and as we have before stated, under the facts proven a recovery might have been had against the firm of Grindell & Dainty. The acceptor of a bill of exchange becomes primarily liable for its payment, and is to be considered the principal debtor; and this is true even if the acceptance was for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it. Cronise v. Kellogg, 20 Ill. 11; Diversy v. Moor, 22 Ill. 331, 74 Am. Dec. 157. In Hall v. First National Bank of Emporia, 133 Ill. 234, 24 N. E. 546, Hall Bros. were commission men in the Union Stock Yards. In response to a request from Greer & Way they telegraphed the First National Bank of Emporia they would honor Greer & Way's draft for cost of cattle and hogs consigned to them. It was held Hall Bros. agreement to accept the draft before it was drawn made their liability the same that it would have been had they accepted it upon presentation, and that they took the risk of the stock

Digitized by Google

being diverted, either by accident or design, while in transit It is insisted that in any event appellees were justified in refusing to honor the draft because it was drawn for $1,000 more than was required to pay for the horses shipped, and on that account there can be no recovery. The suit is brought to recover only the $2,300, and one of the counts of the declaration contains averments of the credit of $1,000 upon the draft as originally drawn. It does not appear from the evidence that appellees based their refusal to honor the draft on the ground that it was drawn for $3,300, instead of $2,300, nor have they at any time signified a willingness to pay $2,300. On the contrary, they have from the first denied any liability whatever, and have based their denial on the ground that the partnership between Grindell and Dainty had been dissolved before the draft was drawn, and that it was the draft of Grindell, and not of Grindell & Dainty. We think the propositions of law refused by the trial court stated correct principles of law applicable to the decision of this case and should have been held by the court, and that the Appellate Court erred in affirming the judgment of the trial court. Accordingly, the judgments of the Appellate and Superior Courts are reversed, and the cause remanded to the Superior Court."

See Decision No. 1084.

Bills and Notes: Duress: Consideration.

The Fred Rueping Leather Company, the plaintiff in this action, sued Albert F. Watke and recovered judgment upon nine (9) promissory notes for $100 each, which had been executed by Watke. Watke's answer set up a failure of consideration and execution under duress. At the trial it transpired that hides had been stolen from the plaintiff some months previously and were sold by the thief to the business partner of the defendant, defendant having paid for them. The thief was subsequently caught and convicted of the crime. The plaintiff asked the defendant to pay for the hides, and after numerous negotiations between the plaintiff and the defendant, the defendant executed ten (10) promissory notes in the sum of $100 each to the order of the plaintiff. The first one was paid. The other nine were not paid and the plaintiff having sued the defendant, the defendant contended that the notes were executed under duress and in consideration of his not being prosecuted. It was shown that the defendant had taken considerable time to consider the matter and had advised with his counsel before executing the notes. The judgment in favor of the plaintiff was affirmed, the court stating in part:

"At the time the notes were executed and delivered no restraint whatever was exercised over the defendant; but, on the contrary, after consulting with his counsel, and being advised to make the notes, he went to the office of plaintiff's counsel, and freely and voluntarily executed the notes in suit. The doctrine as to what constitutes

Digitized by Google

$25-00/100

Philadelphia, Pa., May 16th 1906

Four months after date ~~we~~ promise to pay

to the order of E. V. Carr

Two thousand five hundred no/100 Dollars

at Philadelphia, Pa.

Value received

Peter Hernig

Ely K. Richard

No. Due

Digitized by Google

Pay to the order
of Bank of Morehead
E. V. Carr.

This note was executed to E. V. Carr for his accommodation by Peter Hernig and Ely K. Richard and by him indorsed to the plaintiff in this action, the Bank of Morehead. The affidavit of defense of the makers, Hernig and Richard, who were sued by the indorsee above named, set up that two notes, one dated May 11th and one May 16th, were made to Carr for his accommodation by the defendants, and he was not to use the last one if he succeeded in having the first one discounted. The first one was discounted and paid by the defendant Hernig, and Carr was asked by the defendants for the second one and stated that he had left it in Kentucky and would return it. The plaintiff bank made an inquiry of defendant Hernig in regard to this note in suit, and Hernig told the bank that the makers did not owe Carr any money and not to advance any money to Carr on the note. The affidavit further states that no money, if any, had been advanced up to the time the bank made this inquiry. The court of original jurisdiction held that the affidavit of defense was insufficient, but the Appellate Court held that the affidavit was sufficient and that if it was proved that the plaintiff bank had notice of all the facts which are set forth in the affidavit of defense it would not be an innocent holder for value, and that if it advanced any consideration after the notice, it would not be protected except to the extent of the consideration advanced before notice was given that there was a defect in the note.

Digitized by Google

duress has been so often considered and discussed by this court that we deem it necessary only to refer to a few of the authorities on the subject. Bank v. Kusworm, 91 Wis. 166, 64 N. W. 843; Bank v. North, 114 Wis. 637, 90 N. W. 1016; Rochester M. T. Works v. Weiss, 108 Wis. 545, 84 N. W. 866; Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; Mack v. Prang, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. Rep. 848; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. This court said, in Bank v. Kusworm, supra: 'Duress exists where one, by the unlawful act of another, is induced to make a contract, or perform some act under circumstances which deprive him of the exercise of free will.' We think the undisputed evidence not only fails to show duress, but establishes that there was no duress. On the question of want of consideration we think it equally clear that this defense was not established; but, on the contrary, that it was established without substantial dispute that the notes were given in payment of the stolen hides received by the defendant's firm. In fact it was not disputed but what the settlement was made and the notes given to pay for such property. Respecting the claim in appellant's brief that the notes were given to avoid prosecution, hence illegal and void, we think it sufficient to say that neither the allegations of the answer nor the proof support such defense. There is, in fact, no testimony rising to the dignity of proof of an agreement not to prosecute defendant for any offense. There is neither allegation nor proof that, at the time the notes were given, any criminal prosecution was pending against the defendant, or that he was in fact guilty of any criminal offense. Such allegation and proof would be necessary in order to support this defense. Catlin v. Henton et al., 9 Wis. 477; Shultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Bank v. Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; Johnston H. Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. St. Rep. 39; section 4501, St. 1898. The court below found that there was not sufficient evidence to go to the jury upon any of the issues raised by the defendant's answer, and we are inclined to the opinion that the court was right, therefore, cannot disturb the ruling. It follows that the judgment below must be affirmed."

See Decision No. 1085.

Bills and Notes: Accommodation Paper: Holder for Value.

Peter Hernig and Ely K. Richard, who are the defendants in this action, executed a note, in effect similar to the illustration, to the order of E. V. Carr, who indorsed the same to the plaintiff, the Bank of Morehead. The affidavit of defense of the defendant makers, Hernig and Richard, sets up that they had made two notes to the order of E. V. Carr, one dated May 11th and the other May 16th, for his accommodation, and that Carr had agreed that if the first one was discounted, the other one would be returned to the makers. Carr had the first one discounted at a bank at Philadelphia and it was paid by Hernig. Carr was requested by the defendants to return

Digitized by Google

the other note, and he told them that he had left it in Kentucky. Shortly afterward Hernig received an inquiry from the plaintiff, the Bank of Morehead, in regard to the note in suit, and Hernig told the Bank of Morehead that they should not advance any money to Carr upon this note, that the makers didn't owe Carr anything. The affidavit further stated that no money, or at least a very small amount, had been advanced upon this note by the plaintiff bank prior to this conversation with Hernig. An order was entered by the lower court making absolute rule for judgment for want of a sufficient affidavit of defense, and the defendants appealed and the judgment was reversed. The court held that if the circumstances as set forth in the affidavit of defense were proved, the holder would not have been an innocent holder for value, and that if a transferee receives notice of any defect in the title before paying the full amount, he will only be protected to the extent of the consideration theretofore advanced.

The court said in part:

"In Hoffman v. Foster & Co., 43 Pa. 137, the affidavit of defense averred that the note was for the accommodation of the payee, and was sent in a letter to him, that he denied receiving it and asked for a duplicate, promising to return the original, if found. A second note was given and paid by the defendant, who was then sued upon the original note, which the payee had fraudulently negotiated. It was held that the plaintiff was required to prove that he took the note for a valuable consideration and before maturity. In the opinion it is said (page 138): 'As against McGinnis (the payee), he (the defendant) always had an ample defense to both notes, and it is clear that the first note has thrown around it a cloud of suspicion and fraud which calls upon the plaintiff to show that he obtained it upon a valuable consideration in the usual course of business before it was due.' In Real Estate Investment Company v. Russel, 148 Pa. 496, 24 Atl. 59, it appeared that the note in suit was put in circulation by fraud. In reversing the court below and holding that there was sufficient in the affidavit to call upon the plaintiff to show that he was a bona fide holder, Chief Justice Paxson said (page 499 of 148 Pa., page 59 of 24 Atl.): 'It (the averment of fraud) is sufficient to require the plaintiff to show that he took the note before maturity, and paid value for it. Were this not the rule, it would be impossible for the maker of a note, fraudulently issued, to set up any defense whatever. As a general rule, in such cases the maker has no knowledge as to whether the plaintiff paid value or not, hence he cannot conscientiously swear that he is not a bona fide holder. It is no hardship to the plaintiff to require proof of consideration.' The same rule obtains under the Negotiable Instruments Law passed in 1901, which is simply declaratory of the law as it existed at the time of the passage of the act. By its provisions, if the title of the person who negotiated the instrument is defective, the burden is on the holder to prove that he or some person under whom he claims acquired a title in due course.

"The title of a person who negotiates an instrument is defective within the meaning of the act if he obtains the note or any signature

Digitized by Google

by fraud, or when he negotiated in breach of faith, or under such circumstances as amount to a fraud. If the transferee receives notice of any defect in the title of the person negotiating it before he has paid the full amount, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. Under the circumstances set forth in the affidavit of defense, we think the defendants have disclosed as much knowledge of the consideration paid by the holder for the note in suit as could be expected. They aver that they expect to be able to prove that a very small amount of money, if any, was paid prior to the receipt of the notice given to plaintiff. In the absence of any averment in the statement that the transfer was made for value and without notice, we do not think the defendants are required, or can be expected, to make a more definite averment in regard to the consideration paid by the plaintiff to the payee for the transfer of the note. The plaintiff has knowledge of what was paid as a consideration, while the defendants do not have such knowledge, and have no means of knowing whether anything was paid or not, and hence they cannot conscientiously aver in their affidavit what consideration, if any, the payee received for the transfer of the note."

See Decision No. 1086.

Banks and Banking: Joint Accounts: Gifts.

Lizzie C. Robinson sued the Mutual Savings Bank of San Francisco to recover the amount of a deposit standing to the credit of "Amanda M. Scales or Lizzie C. Robinson." Joseph Leggett and Charles H. Robinson, as executors of Amanda M. Scales were interpleaded, they claiming that the deposit belonged to Amanda M. Scales. The bank was allowed to deposit with the court the amount of the deposit, namely, $4,370, and was thereupon dismissed from the action. The substituted defendants, the executors of Amanda M. Scales, alleged that Amanda M. Scales died on July 7, 1904, and before that date she deposited the money in the Mutual Savings Bank of San Francisco to the credit of "Amanda M. Scales or Lizzie C. Robinson," and that the reason why she directed the deposit to be deposited in this way was for the purpose of enabling the said Lizzie C. Robinson to act as her agent. The trial court found for the plaintiff and the defendants appealed. The judgment was reversed. It was shown at the trial that Mrs. Scales was a woman eighty years of age and totally blind, and that the plaintiff Lizzie C. Robinson had been in the habit of attending to business for her for several years, and that all the items of deposit belonged to Mrs. Scales with the possible exception of one, about which there was a dispute. Lizzie C. Robinson testified that Mrs. Scales wished the money deposited in the way in which it was deposited so that she (Lizzie C. Robinson) could pay bills for her, and she further testified that Mrs. Scales had told her that she

Digitized by Google

wanted to open this little account and make it a joint account so that whatever was left after Mrs. Scales died would belong to her, and that she, Lizzie C. Robinson, had the privilege of drawing upon it to meet her personal expenses, but had never done so. The evidence also showed that the plaintiff, Lizzie C. Robinson, actually did draw out $1,359.20, the deposit having been originally $5,729.69, for the purpose of paying bills for Mrs. Scales. The Appellate Court held there had been no gift to the plaintiff, nor had there been established a joint tenancy. At least one of the elements of gift was lacking, namely, delivery. To constitute a valid gift the donor must absolutely renounce all claim and interest in the gift and must retain no control over the thing which he has given. It must operate in the present, and a gift is not valid and cannot be enforced which is to take place in the future. In this case Mrs. Scales retained control over this deposit, even to the extent of retaining the bank book. She had not relinquished her rights in the deposit, therefore it could not be contended that she had given it to the plaintiff, nor was there evidence of a joint account here which would entitle the plaintiff to become the owner of the deposit upon the death of Mrs. Scales for the reason that it was proved that the deposit was made in the joint names "Amanda M. Scales or Lizzie C. Robinson" so that Lizzie C. Robinson could act as agent for Mrs. Scales.

The court said in part:

"The evidence does not show a gift by Mrs. Scales to plaintiff of all the moneys deposited in the account or of the account itself. Although the deposit was in the names of either, and either could draw therefrom as between themselves and the bank, this does not show a gift to plaintiff, nor constitute a joint tenancy or ownership with a right of survivorship. Mrs. Scales at all times retained the right herself to draw the money. She retained dominion over it. She never delivered the bank book to plaintiff. It at all times remained in the possession of the bank at the convenience of both Mrs. Scales and plaintiff. 'A valid gift goes into immediate effect, and has no reference to the future. It divests the donor of his title, and requires a renunciation on his part of all claim and interest in the subject of the gift.' Denigan v. Hibernia, etc., Soc. 127 Cal. 137, 59 Pac. 389; Denigan v. San Francisco Sav. Union, 127 Cal. 142, 59 Pac. 390, 78 Am. St. Rep. 35. In both of the above-cited cases money, the separate property of a wife, was deposited in the names of the husband and wife, 'and payable to the order of either of them.' It was held that the form of the deposit did not indicate any gift to the husband or any joint interest of both parties with a right of survivorship. In the latter case it was held that the rule that joint interests or estates are such as are created by a single will or transfer in equal shares, when expressly declared in the will or transfer to be a joint tenancy, applies to personalty as well as to realty. The doctrine of the Denigan cases is supported by the following cases, all of which are reviewed in the second Denigan case: Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486; Gorman v. Gorman, 87 Md. 338, 39 Alt. 1038;

Digitized by Google

$500.00 NEW YORK, Dec. 28th, 1906

Six months and five days AFTER DATE I PROMISE TO PAY TO

THE ORDER OF myself

Five Hundred and no/100 DOLLARS

AT 16½ Canine St.

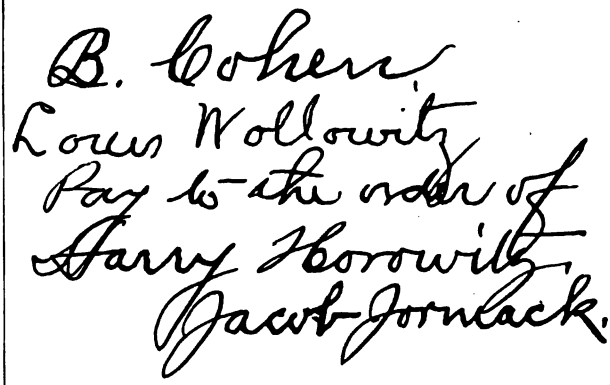
VALUE RECEIVED

B. Cohen

NO. DUE

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

Digitized by Google



Harry Horowitz, above named, who is the holder of this note, sued his prior indorsers, Cohen, Wollowitz and Jormack. Wollowitz was an accommodation indorser. B. Cohen, who was also an indorser, made and executed the note, and delivered the same to Jormack, who transferred it before maturity to the plaintiff. There was usury in the inception of the note and the defendants' attorney made a motion to dismiss the complaint on the ground that the note was void in its inception on account of the taint of usury. The laws of New York make a usurious contract void as to principal and interest. The trial court rendered judgment in favor of the defendant on this ground and the plaintiff appealed. The Appellate Court reversed the judgment of the trial court and stated in its opinion that section 116 of the Negotiable Instruments Law made the indorsers of a promissory note liable even though there was usury in the inception of the note, because an indorser of a promissory note warrants that at the time of his indorsement the note is valid and subsisting. Section 116 of the Negotiable Instruments Law reads as follows: "That every indorser who indorses without qualification warrants to all subsequent holders in the due course: . . . (2) That the instrument is at the time of his indorsement valid and subsisting." There would be some question as to whether or not the maker of the note would be liable under the circumstances set forth above, but under this decision there seems to be no question about the liability of the indorser.

Digitized by Google

Schick v. Grote, 42 N. J. Eq. 352, 7 Atl. 852; Noyes v. Newburyport Sav. Inst., 164 Mass. 583, 42 N. E. 103, 49 Am. St. Rep. 484. The evidence does not bring this case within the doctrine of Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, where money was deposited in such a way as to constitute the bank a trustee for plaintiffs, nor within Sprague v. Walton, 145 Cal. 228, 78 Pac. 645, where the wife, on the order of her husband, actually drew certain money and deposited it in her own name. In no aspect of the case can it be said that the findings attacked are sustained by the evidence, and for this reason the judgment and order must be reversed. We have not overlooked the testimony given by plaintiff that one item of the deposit was given to her outright by Mrs. Scales for her own use, before the same was deposited. There was a sharp conflict in the evidence on this point, Mr. Leggett testifying to a statement made to him quite inconsistent with the claim that the item in question had been given to plaintiff. In this connection it is well to revert to what was said in Denigan v. Hibernia, etc., Soc., supra: 'When the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift.' But whatever the fact may be concerning the claim that this particular item was given to plaintiff, and by her afterwards deposited in the account sued on, the amount of the same is less than the balance sued for and for which judgment was given. If this particular sum of money was therefore the money of plaintiff, and deposited by her for her use in the account, this fact does not sustain the findings as made, nor the judgment rendered."

See Decision No. 1087.

Bills and Notes: Negotiable Instruments Law: Liability of Indorser.

Harry Horowitz, the holder and indorsee of the accompanying illustrated note, sued Louis Wollowitz and the other indorsers whose names appear upon the back of this note. Wollowitz was an accommodation indorser. The note was executed by Cohen and delivered to Jormack who transferred the note to the plaintiff before maturity. It was conceded at the trial that there was usury in the inception of the note between Cohen and Jormack, and the defendant moved to dismiss the complaint on the ground that it was void because of the usury in its inception, the laws of New York providing that a usurious contract is void. The court rendered judgment in favor of the defendant and the plaintiff appealed. The Appellate Term reversed the judgment of the court below on the ground that as section 116 of the Negotiable Instruments Law provides "That every indorser who indorses without qualification warrants to all subsequent holders in due course: . . . (2) That the instrument is at the time of his indorsement valid and subsisting," the indorsers were liable. If this action had been one against the maker of the note, there would have been a question as to whether or not the action could have been maintained on account of the usury; but the action being against the in-

Digitized by Google

dorser, the indorser was held to be liable for the reason that the indorser warrants that the instrument, at the time of his indorsement, is valid and subsisting.

The court said in part:

"On behalf of the appellant it is claimed that section 96 of the Negotiable Instruments Law (Laws 1897, c. 612, p. 732) has entirely swept away the defense of usury as against holders in due course, citing Schlesinger v. Kelly, 114 App. Div. 546, 99 N. Y. Supp. 1083; Wirt v. Stubblefeld, 17 App. Cas. (D. C.) 284; Broadway Trust Co. v. Manhiem, 47 Misc. 415, 95 N. Y. Supp. 93, and the concurring memorandum of Mr. Justice Willard Bartlett in Schlesinger v. Gillhooly, 189 N. Y. 1, at page 34, 81 N. E. 619, at page 631. It is not necessary in the present case, however, to pass upon the question of the availability to the maker of a note of the defense of usury as against holders in due course, because the liability involved in this appeal is that of an indorser, not of the maker, and the liability of an indorser is dealt with in other portions of the act; section 116 providing: 'That every indorser who indorses without qualification warrants to all subsequent holder in due course: . . . (2) That the instrument is at the time of his indorsement valid and subsisting.' In Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, one Truman made his promissory note to one Eaton, and then forged Eaton's indorsement, and next procured the defendant Windholz to indorse it. The note with these two indorsements upon it was presented to the plaintiff, who were note brokers, and by them was negotiated for the benefit of Truman. The defendant and those subsequent to him believing the indorsement of Eaton genuine, and the plaintiffs learned he was responsible. The Appellate Division sustained the judgment in favor of the plaintiffs, holding that the defendant by his contract of indorsement guaranteed the genuineness of the signature of Eaton, the prior indorser on the note, and that the note was a valid and subsisting obligation, citing section 116 of the Negotiable Instruments Law. This ruling was upheld by the Court of Appeals without opinion. 180 N. Y. 549, 73 N. E. 1121. In Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11, it was held that the fact that the name of the maker of a note was forged did not discharge the indorser; the ground of the decision being that the indorsement of a promissory note implies a contract by the indorser with a subsequent bona fide holder that the instrument itself and all the signatures prior to the particular indorsement are genuine. Under the language of the statute, as applied by the above decisions, it must be held that in indorsing the note the defendant warranted its validity, and that he cannot be heard now to assert that it is void for usury, any more than for forgery or any other cause. Furthermore, apart from the provisions of section 116, it is an established rule that the obligation of an indorser is a new and independent contract separate and distinct from the contract evidenced by the note. 4 Am. & Eng. Encyc. of Law (2d ed.) 477, and cases cited: Morford v. Davis, 28 N. Y. 481; Donahue v. Meeker, 35 App. Div. 43, 54 N. Y. Supp. 286. The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur."

See Decision No. 1088.

Digitized by Google

THE TRUST COMPANY OF AMERICA v. HAMILTON BANK OF NEW YORK CITY, STATE OF NEW YORK.

(Supreme Court, Appellate Division, First Department. July, 1908.)

Present: Hons. GEORGE L. INGRAHAM, CHESTER B. McLAUGHLIN, JOHN PROCTOR CLARKE, JAMES W. HOUGHTON, and FRANCIS M. SCOTT, JJ.

Submission of a controversy under section 1279 of the Code of Civil Procedure.

Albert B. Boardman, for plaintiff. Herman Aaron, for defendant.

McLAUGHLIN, J. This is a controversy submitted to the court upon an agreed statement of facts under section 1279 of the Code of Civil Procedure. The controversy relates to four checks for $500 each, drawn upon the plaintiff, a trust company doing a banking business, and signed "Estate of Kate M. Wallace, Arthur B. Wallace, admr." At the time the checks were presented to the plaintiff for payment the estate of Kate M. Wallace was one of its depositors having to its credit an amount in excess of all the checks which could be drawn out on checks signed by Arthur B. Wallace, adm'r, when countersigned by the United States Fidelity & Guaranty Company. The Wallace estate had then been practically settled and the amount on deposit was ready for distribution among the next of kin of the decedent. The four checks in question were drawn without the knowledge or authority of the administrator, his signature being forged, and in each there was inserted as payee the name of some one of the next of kin whose distributable share of the amount on deposit with the plaintiff was greater than the amount of the check or checks thus apparently payable to such person. The first check was dated September 25, 1905, and was presented on that day to the United States Fidelity & Guaranty Company by a person unnamed without the knowledge of plaintiff or defendant. The United States Fidelity & Guaranty Company, relying upon the apparent genuineness of the check, countersigned the same, and it was then, by some person unknown, presented to the plaintiff for acceptance and by it accepted, in writing. The name of the payee was then forged upon the back of the check as first indorser, and it was subsequently deposited with the defendant by one M. F. Kerby, one of its depositors, who was given credit for the same. It then bore the following additional indorsements: "Harvey J. Conkey, M. F. Kerby, A. Edward Fisher." Thereafter the defendant, through the New York Clearing House, presented the check to the plaintiff for payment, guaranteeing the indorsements, and it, relying upon the genuineness of the check, with the guarantee of the defendant thereon, not knowing that the indorsement of the payee was forged, paid the same in good faith. Substantially the same facts are true in regard to the second check, which was dated in November, 1905. The other two checks, dated in December, 1905, and January, 1906, were not presented to plaintiff for acceptance before payment and were deposited with defendant by Harvey J. Conkey, one of the depositors, to the credit of his account. Otherwise, the same course was pursued with

Digitized by Google

regard to them. They were indorsed "Harvey J. Conkey" below the forged indorsement of the payee.

Upon discovering the forgeries the plaintiff at once notified the defendant, tendered back the checks and demanded repayment. In the meantime both Kerby and Conkey had withdrawn the proceeds of the checks, and the defendant, relying on plaintiff's acceptance and payment of them, had paid out the same in good faith. The defendant has refused to repay plaintiff the amount of the checks, or any of them, and the question presented is whether plaintiff is entitled thereto.

The general rule is that payments made under a mistake of fact may be recovered, although negligently made, but it is also settled that if the drawee of a bill of exchange to which the drawer's name has been forged accepts or pays the same he can neither repudiate the acceptance nor recover the money paid, since he is bound to know the drawer's signature. Price v. Neal, 3 Burrows, 1354; Bank of United States v. Bank of Georgia, 10 Wheat. 333; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77; Goddard v. Merchant's Bank, 4 N. Y. 147. It is also settled that where the indorsements of the payee of a bill of exchange have been forged subsequent holders obtain no title to it, and payments made to one who holds under such forged indorsements may be recovered. Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74; Holt v. Ross, 54 N. Y. 472; Canal Bank v. Bank of Albany, 1 Hill, 287. Therefore, if all the indorsements on the checks in question had been genuine, the plaintiff could not recover. But if the maker's signatures had been genuine, and only indorsements or any of them forged, it could recover. Having paid the checks, the plaintiff cannot now be heard to say that the maker's signatures are not genuine, or recover on the ground that the same were forged, and by reason of that fact, it is suggested that the rights of the parties are precisely the same as though the drawer's signatures were genuine, and since the defendant never obtained good title to them, on account of the forged indorsements of the payees, the plaintiff is entitled to recover. These are authorities to support this contention: First Nat. Bank v. Northwestern Bank, 152 Ill. 296; McCall v. Croning, 3 La. Ann. 409. But it does not necessarily follow because the checks were not indorsed by the persons whose names appeared on them as payees, that the defendant, which received them in good faith and paid value therefor, can be compelled to repay their amounts to the plaintiff.

A leading authority on the subject is Bank of England v. Vagliano Bros., L. R. 1891 App. Cas. 107, which reversed Vagliano v. Bank of England, 23 Q. B. D. 243, and 22 Q. B. D. 103. This authority has been frequently cited, and is directly in point. There Vagliano Brothers were foreign bankers, doing a large business in various parts of the world. One of their clerks, Glyka, forged a large number of bills of exchange purporting to be drawn on the firm by one of its foreign correspondents, payable in another well-known firm. He also forged letters of advice to accompany them, and caused them to be presented, the same as genuine bills, to Vagliano Brothers, in the regular course of business. Vagliano Brothers, deceived by the cleverness of the forgeries, accepted from time to time bills aggregating over $350,000, which they directed the Bank of England, their

Digitized by Google

general banker, to pay when presented. After bills had been accepted Glyka would obtain possession of them, indorse thereon the names of the payees, and collect the money from the bank, which would charge the amounts so paid to the account of Vagliano Brothers. The latter, on discovering the forgeries, sued the bank to recover the amounts so paid out on the forged bills. The House of Lords held, reversing the decisions of the lower courts, that this amount could not be recovered. The decision is placed upon the ground that, "Since Glyka, although he inserted in the forged bills as payee the name of a well-known firm, knew that such firm had no interest in the bills, and never intended that it should, the payee was fictitious." And under the statute providing that "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer" (Bills of Exchange Act, 1882, § 7, sub. sec. 3), the bills of exchange were in legal effect payable to bearer, and the bank obtained good title, regardless of the indorsements.

Some doubt was expressed in the Bank of England case as to whether the statute warranted such construction, since the effect was to make the fictitiousness of the payee depend upon the maker's intention, but under our own statute no such question can be raised. The Negotiable Instruments Law provides (Laws of 1897, chap. 612, § 28): "The instrument is payable to bearer — 3. When it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable."

The correctness of the decision in First National Bank v. Northwestern Bank, supra, may well be questioned, since the decision of the lower court — which was reversed by the House of Lords — in the Bank of England case was cited at length and relied upon. Whether this be so or not, the decisions in our own State are entirely in harmony with the views expressed by the House of Lords. Thus, in Coggill v. Am. Exch. Bank, 1 N. Y. 113, a partner drew a bill of exchange in the name of the partnership, payable to one Truman Billings, and forged thereon the indorsement of the latter. The bill subsequently came into the hands of the defendant bank, and the plaintiff, upon whom it was drawn, accepted and paid it. It was held that the plaintiff, on discovering the forgery, could not recover the amount paid from the defendant, since the bill was in effect payable to bearer and defendant had good title. Mr. Justice Bronson, who delivered the opinion of the court, distinguished the case of Canal Bank v. Bank of Albany, supra, and said: "As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded in relation to this matter as a nonentity; and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person the holder may declare and recover upon it as a bill payable to bearer. . . . In legal effect, though not in form, the bill is payable to bearer. . . . The plaintiff probably accepted and paid the bill under the mistaken assumption that the indorsement was genuine. But he was not mistaken about the main fact which he was concerned to know, which was that the holder was the owner of the bill."

And in Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, the cashier of the National Bank of Sumter, S. C., drew checks in the name of

Digitized by Google

the bank, inserting as payee the names of customers of the bank, whose indorsements he forged. The checks thus drawn were sent to various firms in New York, and subsequently came into the hands of the defendant, which received them in good faith and charged them to the account of the Sumter bank. The receiver of the Sumter bank thereafter brought an action to recover the amount of the checks, and it was held that the same could not be maintained, since in legal effect the payees were fictitious and the checks payable to bearer, and for that reason the defendant obtained good title. The court, Mr. Justice Gray delivering the opinion, said: "The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's money by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existing person, but upon the intention underlying the act of the maker in inserting the name."

Under the Negotiable Instruments Law and the cases cited, I am of the opinion that the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the maker's signature, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the Bank of England and the Phillips cases, in order to accomplish the fraud more easily, the names inserted as payees were those of persons to whom checks might naturally be made. Whether indorsing the names of the payees upon the checks was technically forgery or not it is unnecessary to consider; it has been convenient to thus describe them. Despite these forged indorsements, then, the defendant acquired good title, since in legal effect the checks were payable to bearer. Plaintiff having paid them to a holder in due course, cannot recover upon the ground that the payees' signatures were forged.

Nor is this view at all in conflict with Shipman v. Bank of the State of New York, 126 N. Y. 318. There the plaintiff's firm signed a large number of checks, relying on the false statements of an employee, the names of the payees being in some instances fictitious and in others the names of existing persons. The employee, upon whose false statements the checks were drawn, then indorsed upon them the names of respective payees, and the checks were thereafter paid in good faith by the bank upon which they were drawn. The court held that the plaintiffs could recover from the bank the amount paid, distinguishing the Bank of England case, and the distinction is obvious. In the former case the member of the firm who signed the checks in the firm name believed that in every instance the payee was a real person, to whom alone the check was payable, while in

Digitized by Google

$500 00/100 Leavenworth, Kansas. April 19, 1895

For value received ninety days after date we promise to pay to the order of M. Ryan estate only

five hundred 00/100 ——— Dollars

at our office, Leavenworth, Kansas.

Value received

Fisher Machine Works Co

G. H. Fisher

No. Due July 18.

Digitized by Google

Mary R. Loftus
administratrix
of the estate of
Mathew Ryan,

This is a non-negotiable note for the reason that it is payable to "the M. Ryan estate only," and the Negotiable Instruments Law which is in effect in the State of Kansas, where this action was brought, provides that "An instrument to be negotiable must conform to the following requirements: (4) Must be payable to order or to bearer." If an instrument is not payable to order or bearer it is not a negotiable instrument and cannot pass by indorsement, and the holder does not take free from the equitable defenses which the maker might set up against the payee. The defendant, the maker, Fisher Machine Works Company, alleged that the holder of this note, the Leavenworth National Bank, had no right to sue for the reason that the estate could not transfer the note by indorsement because the note was payable to the M. Ryan estate only, and that the indorsement of the note by the administratrix was unauthorized. The plaintiff on the trial introduced the note in evidence and no evidence was introduced on behalf of the defendant, and judgment was rendered for the plaintiff and this judgment was affirmed on appeal. The Appellate Court held that although this was a non-negotiable note, still the action might be brought by one who had the naked legal title to the note, although the money when collected might belong to some one else.

Digitized by Google

the latter case the person who wrote the maker's signature was a forger who knew that, so far as the bills of exchange were concerned, the payee was fictitious. The court expressly recognized the rule that the maker's intention was controlling, saying: "The maker's intention is the controlling consideration which determines the character of such paper."

It is true that in many of the authorities cited the person guilty of the fraud was connected some way with one of the parties, which may have affected the equities of the case, as was suggested in Shipman v. Bank of State of New York, supra, concerning the decision in the Bank of England case, while here, so far as appears, the guilty person was a stranger to both plaintiff and defendant, and they are equally innocent. But that cannot change the law as to the fictitiousness of the payees, and if it did I am of the opinion that any equities in the present case are with the defendant. The risk of paying out money upon a forged signature of a depositor is one which a banker must assume, and if the plaintiff had detected the forgeries when the checks were presented for payment it would not have suffered any loss, and it is possible that the defendant would not.

I am of the opinion that the plaintiff has no legal claim against the defendant, and for that reason the latter is entitled to judgment upon the merits, with costs.

All concur.

Bills and Notes: Non-negotiable Note.

The Leavenworth National Bank, of Leavenworth, Kan., obtained the accompanying illustrated promissory note from the M. Ryan estate by the alleged indorsement of Mary R. Loftus, administratrix of the estate. It sued the maker, the Fisher Machine Works Company, and recovered judgment, and the defendant Fisher Machine Works Company appealed. It will be noticed that this is not a negotiable note. The Negotiable Instruments Law provides that: "An instrument to be negotiable must conform to the following requirements: (4) Must be payable to order or bearer." This note is payable to the M. Ryan estate only. The fact that it is not payable to the order of some one, or to bearer, makes it non-negotiable. The defendant alleged that the note was non-negotiable and that the plaintiff could not be the legal owner of it, and had no legal capacity to sue, and further that the indorsement of the note by the administratrix of the Ryan estate was unauthorized and therefore invalid. The defendant moved on the trial for a judgment upon the pleadings, but this motion was denied. The plaintiff offered the note in evidence and rested, and there being no further evidence, judgment was rendered for the plaintiff. The Appellate Court affirmed the judgment of the trial court, holding that notwithstanding the fact that the note was non-negotiable, and that the administratrix

Digitized by Google

had no right to indorse the note, still if an action was brought by a person who had the naked legal title to a note he could collect, even though the money belonged to another.

The opinion of the court follows in full:

FISHER MACHINE WORKS CO. v. LEAVENWORTH NAT. BANK.

(Supreme Court of Kansas. February 8, 1908.)

94 Pac. 124.

BILLS AND NOTES — ACTION BY HOLDER — DEFENSES — PARTIES.

1. The holder of a non-negotiable promissory note, indorsed by the payee, is prima facie entitled to maintain an action, for the collection thereof.

2. A non-negotiable promissory note was owned by an estate. The administratrix indorsed the note in blank, and delivered it to a bank. The bank commenced an action in its own name against the maker to enforce collection. In its verified answer the maker admitted the execution of the note, but denied the authority of the administratrix "to indorse the note to the bank or any other party." On the trial the plaintiff presented the note to the court and demanded judgment. No proof being presented by the defendant, judgment was entered for plaintiff.

(Syllabus by the Court.)

Error from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Action by the Leavenworth National Bank against the Fisher Machine Works Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was commenced in the District Court of Leavenworth county, September 5, 1905, by the defendant in error, against the plaintiff in error, upon a promissory note. The petition was in ordinary form, the note being attached as an exhibit, which reads: "$500.00. Leavenworth, Kan., April 19, 1905. For value received, ninety days after date we promise to pay to the order of the M. Ryan estate only five hundred and $^{no}/_{100}$ dollars at our office, Leavenworth, Kansas. Due July 18. [Signed] Fisher Machine Works Co., G. H. Fisher." Note indorsed: "Mary R. Loftus, Administratrix of the Estate of Mathew Ryan."

Defendant filed a verified answer, which, omitting caption, reads: "Now comes the defendant, and for its answer to the petition of the plaintiff heretofore filed herein denies each and every allegation made or contained in said petition, except that the defendant admits that it is a corporation. (2) Defendant for further answer herein denies that it made, executed, and delivered any such note to the M. Ryan estate as is alleged and set forth in the petition of plaintiff herein, or that said plaintiff is the legal owner of any such note as was made, executed, and delivered by the defendant herein to said M. Ryan estate. (3) Defendant for further answer herein refers to the above and foregoing as part hereof, and further alleges that on or about the 19th day of April, 1905, it made, executed, and delivered to the 'M. Ryan estate only' its certain promissory note,

Digitized by Google

which was in the words and figures following, to wit: '$500.00 Leavenworth, Kan., April 19, 1905. For value received, ninety days after date we promise to pay to the M. Ryan estate only five hundred and $^{no}/_{100}$ dollars at our office, Leavenworth, Kansas. Fisher Machine Works Co., G. H. Fisher.' But defendant alleges that said note so made, executed, and delivered by it as aforesaid is payable to the M. Ryan estate only, if payable to any one, and is non-negotiable, and that plaintiff is not and cannot be the legal owner thereof, and has no legal capacity to sue the defendant herein thereon, and that said plaintiff has no right to recover a judgment thereon against the defendant herein. (4) Defendant for further answer herein refers to the above and foregoing as part hereof, and further alleges that it denies that Mary R. Loftus, acting as the administratrix of the M. Ryan estate, had any legal right or authority to indorse said above-described note to the plaintiff herein, or to any other party or parties."

The verification is as follows: "George H. Fisher, of lawful age, being duly sworn on oath, deposes and says that he is president of the Fisher Machine Works Company, a corporation, the defendant herein, that he knows the contents of the above and foregoing answer, and that all of the statements therein contained are true. Affiant further avers that said the Fisher Machine Works Company denies under oath that it made, executed, and delivered any such note as is sued on by the plaintiff herein, and a copy of which is set forth in the plaintiff's petition herein, and it further denies that Mary R. Loftus, as administratrix of the M. Ryan estate, had any legal right or authority to indorse to the plaintiff herein, or to any other party, the note, a copy of which is set forth in this answer."

There was no reply. When the case was reached for trial, plaintiff was permitted to amend the petition by striking out of the note the words "order of." Then both parties, without further change in the pleadings, demanded "judgment on the pleadings." During discussion upon this question, counsel for defendant said to the plaintiff's attorney: "Do you concede that the plaintiff owns that note and holds it by indorsement?" To which plaintiff's attorney replied: "The plaintiff holds this note as collateral security by assignment." The plaintiff then produced the note in open court, and judgment was given in its favor. The journal entry of judgment reads: "On this 26th day of May, A. D. 1906, came the plaintiff herein, the Leavenworth National Bank, a corporation, by A. E. Dempsey, its attorney, and also came the defendant, the Fisher Machine Works Company, a corporation, by Arthur M. Jackson and J. C. Petherbridge, its attorneys, and thereupon this cause came on for trial, and a jury having been duly waived, the trial hereof was proceeded with before the court, and thereupon plaintiff asked leave of court to amend its petition herein by striking out the words 'the order of' in the copy of the note set up in its petition, which application and permission the court granted over the objection and exception of the defendant. The defendant thereupon moved the court to continue the trial of this cause to the next term of this court, which motion was by the court overruled, and to which ruling and decision of the court defendant at the time duly objected and excepted. Thereupon the defendant moved the court for judgment

Digitized by Google

in its favor herein upon the pleadings filed herein, which motion was by the court overruled, and to which ruling and decision of the court the defendant at the time duly objected and excepted. Thereupon the plaintiff produced the note sued upon in open court, moved the court for judgment herein in its favor upon the pleadings, and there being no evidence offered or adduced by defendant, said motion was by the court sustained, and to which judgment, ruling, and decision of the court the defendant at the time duly objected and excepted. It is therefore now by the court considered, ordered, and adjudged that the plaintiff, the Leavenworth National Bank, have and recover of and from the defendant, the Fisher Machine Works Company, a corporation, the sum of five hundred dollars ($500), with interest thereon from July 19, 1905, until paid at the rate of six per cent. per annum, and the costs of this action, taxed at $—, and that execution issue therefor, to which judgment the defendant at the time duly objected and excepted and gave notice of a motion for a new trial."

Arthur M. Jackson and J. C. Petherbridge, for plaintiff in error. A. E. Dempsey, for defendant in error.

GRAVES, J. (after stating the facts as above). When this case was presented to the District Court, each party insisted that the burden of proof was upon the other, and each claimed judgment upon the pleadings. The court decided that the plaintiff was entitled to judgment as prayed for, and awarded it accordingly.

This presents the only question in the case. We have concluded that the court was correct. The note was made payable to the M. Ryan estate only. It was indorsed by the administratrix of that estate in blank and delivered to the plaintiff, who actually produced it in court upon the trial. That is not denied. The only issues presented by the pleadings are made by the defendant's denial under oath that the administratrix had authority to make the indorsement on the note, and that the plaintiff was the owner of the note. But while the indorsement, if unauthorized, would not convey the ownership of the note, it was sufficient to give the indorsee the power to collect. This court has repeatedly held that a person who has the naked legal title to a note may collect the same by suit, even though the money, when collected, belongs to another. Manly v. Park, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967; Graham v. Troth, 69 Kan. 861, 77 Pac. 92; Green v. McAuley, 70 Kan. 601, 79 Pac. 133, 68 L. R. A. 308; Stanley v. Penny, 75 Kan. 179, 88 Pac. 875. In this case the bank, by reason of the want of authority in the executrix to indorse the note, may not be the owner thereof, and the proceeds of the note, when collected, may belong to the estate, but this would not prevent the bank from maintaining this action. This rule is discussed in the dissenting opinion of Justice Green in the case of Stewart v. Price, 64 Kan. 201, 67 Pac. 553, 64 L. R. A. 581, and it has since been accepted as the law in this court. Manley v. Park, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967. The rule is stated in the case of McCallum v. Driggs, 35 Fla. 277, 17 South. 407, as follows: "If a note be indorsed in blank, the courts never inquire into the rights of the plaintiff whether he sues in his own right or

Digitized by Google

as trustee, nor into the right of possession, unless a plea be made of mala fides in the plaintiff's possession."

The argument of plaintiff in error has been made here upon the assumption that the judgment was entered for the plaintiff in the District Court wholly because of the state of the pleadings, and the language of the journal entry is to some extent open to such a construction, but, taking its language as a whole, we understand it to mean that the judgment was given both upon the pleadings and the presentation of the note in court. We think the production of the note, which appears on its face to have been regularly indorsed to the plaintiff, was sufficient to justify the judgment.

Judgment affirmed.

Banks and Banking: Certified Checks: Guaranty of a Check.

The Merchants' Bank of Valdosta was a State bank doing business at Valdosta, Ga. The defendant, Baird, was the receiver of the First National Bank of Faribault, Minn. This action was brought by the Merchants' Bank of Valdosta to recover upon eight checks drawn by the Minnesota Lumber Company upon the First National Bank of Faribault, Minn. The Minnesota Lumber Company was doing business in Georgia. The Georgia bank had been cashing checks drawn by the lumber company upon the First National Bank of Faribault, Minn., obtaining in each case the authority of the National Bank to do so. On September 1, 1904, the Georgia bank wrote the National Bank for authority to pay the checks of the Minnesota Lumber Company. The National Bank wrote a letter on September 6, 1904, in which it stated that it would honor the checks of the Minnesota Lumber Company, but they thought there should be some limit and that they would pay the checks drawn on their bank to the amount of $5,000 in any one week, and if more than $5,000 should be drawn in any one week, to have the Minnesota Lumber Company wire the First National Bank of Faribault for permission. On December 6, 1904, the lumber company telegraphed the Georgia bank as follows:

"Faribault, Minn., 6 Dec. 1904.

"'Merchants' Bank, Valdosta, Ga.

"We will protect checks of Minnesota Lumber Company for five thousand dollars per week in excess of present guarantee."

On December 22d, 1904, the Minnesota bank telegraphed the Georgia bank as follows:

"Faribault, Minn., Dec. 22, 1904.

"'Merchants' Bank, Valdosta, Ga.

"You can pay checks Minnesota Lumber Company on us this week in excess of guaranty on personal request of H. O. Clement."

In this connection it may be stated that the H. O. Clement mentioned in the telegram was the son of T. B. Clement, the president

Digitized by Google

of the First National Bank of Faribault, Minn. Between September 6, 1904, and January 1, 1905, the Georgia bank, the plaintiff, cashed checks amounting to $125,000 for the lumber company, and all of the checks were paid by the First National Bank, except the last eight for $1,000 each. The First National Bank of Faribault, Minn., closed its doors on January 2, 1905. The lumber company was insolvent, and this action was brought to recover the amount of the unpaid checks drawn on the First National Bank of Faribault, Minn., by the Minnesota Lumber Company and cashed by the plaintiff, the Merchants' Bank of Valdosta, Ga. Judgment was rendered for the defendant in the District Court of the United States and affirmed by the Circuit Court of Appeals. The First National Bank exceeded its powers when it attempted to lend its credit to the lumber company. Furthermore, a bank cannot certify checks to be drawn for indefinite amounts in the future. The whole transaction was so out of the ordinary that the Merchants' Bank of Valdosta must have had knowledge that there was some irregularity, although it was stipulated that the Georgia bank was not aware of the condition of the lumber company's accounts with the National Bank, and it believed the said National Bank was a bank in good standing, well managed, and that its president was a person of integrity. The opinion of the circuit judge rendering the opinion follows in full:

MERCHANTS' BANK OF VALDOSTA v. BAIRD.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1908.)

160 Fed. 642.

BANKS AND BANKING — CERTIFIED CHECKS — NATURE OF BANK'S LIABILITY — NATIONAL BANKS — GUARANTY OF CHECKS — NOTICE OF INVALID TRANSACTION — POWER OF NATIONAL BANKS — ULTRA VIRES ACT — ESTOPPEL.

1. The certification of a check by a bank, like the acceptance of a draft, creates an original, actionable liability against the bank, and implies that, when the check is certified, the drawer has sufficient funds with the bank, and that they have been set apart and will be retained for the holder whoever he may be, and whenever the check may be presented.

2. A State bank was chargeable with notice that the credit and resources of a national bank were being unlawfully used, barring recovery against the national bank's receiver on checks on the national bank by a corporation, where the national bank's president had written the State bank obligating his bank unconditionally to pay all checks of the corporation, not aggregating more than $5,000 weekly, and the national bank afterwards wired that it would "protect" the corporation's checks for $5,000 weekly in excess of "present guaranty," and later that the State bank would pay cheecks in excess of "guaranty" drawn during the current week.

3. A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of obligations which it rediscounts or sells, but it cannot

Digitized by Google

lend its credit to another by becoming surety, indorser, or guarantor for him, such an act being ultra vires, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction.

4. An act of a national bank, void because ultra vires, cannot be made good by estoppel.

In Error to the Circuit Court of the United States for the District of Minnesota.

The Merchants' Bank of Valdosta sued the receiver of the First National Bank of Faribault to recover upon eight checks drawn by the Minnesota Lumber Company upon the latter bank, and cashed by the former upon the authority of a letter and two telegrams. The case was tried by the court upon the pleadings and an agreed statement of facts. The defendant had judgment, and the plaintiff prosecuted this writ of error. The facts are substantially as follows: At the time of the transactions in question the plaintiff was a bank organized under the laws of Georgia, and doing business at Valdosta, in that State. The lumber company was a corporation engaged in manufacturing lumber in Georgia. The First National Bank of Faribault, as its name indicates, was a banking association organized under the laws of the United States. It was engaged in business at Faribault, Minn., and its capital was $50,000. For some years prior to September 6, 1904, the lumber company had an account with the National Bank, but in one form or another it was always indebted to the bank. On September 6, 1904, it owed the bank $11,848.66 on its own notes and notes of others made for its benefit. Besides this, the bank had purchased and then held bonds of the lumber company, unsecured by mortgage or other lien, amounting to $33,500. Prior to the date mentioned the plaintiff, the Georgia bank, had been paying checks drawn by the lumber company upon the National Bank, obtaining in each case the authority of the latter to do so, but in order to obviate the trouble and expense incident to that course it wrote the National Bank on September 1, 1904, for general authority to pay such checks. On September 6, 1904, T. B. Clement, as president of the National Bank, replied as follows:

"Faribault, Minn., 9-6-04.

"Merchants' Bank of Valdosta, Valdosta, Ga.

"Gentlemen: In reply to your letter of the 1st regarding checks drawn by the Minnesota Lumber Company on this bank, woud say that there is no reason for Mr. Trump acting for the Minnesota Lumber Company, drawing any checks that this bank would not honor, but think there should be some limit placed, and we will say that checks of the Minnesota Lumber Co.'s drawn by J. H. Trump or H. O. Clement on this bank will be paid up to the amount of $5,000.00 in any one week. If any more than $5,000.00 should be drawn in any one week, have them wire for permission."

On December 6, 1904, the National Bank wired the Georgia bank as follows:

"Faribault, Minn., 6 Dec. 1904.

"Merchants' Bank, Valdosta, Ga.

"We will protect checks of Minnesota Lumber Company for five thousand dollars per week in excess of present guarantee."

Digitized by Google

And on December 22, 1904, it further wired the Georgia bank as follows:

"Faribault, Minn., Dec. 22, 1904.

"Merchants' Bank, Valdosta, Ga.

"You can pay checks Minnesota Lumber Company on us this week in excess of guaranty on personal request of H. O. Clement."

T. B. Clement as president signed the name of his bank to both telegrams. H. O. Clement, mentioned in the last telegram, made the personal request therein required. He was a son of T. B. Clement. In reliance upon these communications, and upon the previous course of dealing, the Georgia bank cashed the checks of the lumber company amounting to $125,000 between September 6, 1904, and January 1, 1905, all of which were honored and paid by the National Bank excepting the last eight of $1,000 each, and excepting that upon one of the eight a part payment was made. The National Bank became insolvent and was closed by the comptroller of the currency January 2, 1905. The lumber company was also insolvent. At the close of the bank the lumber company owed the National Bank $33,500 on unsecured bonds and $43,560.32 on other account. The directors of the defunct bank had left the management thereof wholly to T. B. Clement, the president, and they were not aware of the transactions carried on between the two banks and the lumber company. The National Bank was not interested in the business of the lumber company excepting as a creditor. The Georgia bank knew that the proceeds of the checks were for use in the business of the lumber company. Between September 6, 1904, and the 1st of the following January, the account of the lumber company upon the books of the National Bank generally showed a credit balance, but this condition was largely due to the "kiting" of checks and drafts. When the National Bank was closed, there were outstanding and unpaid drafts and checks amounting to over $35,000, for which the lumber company had received credit in its account, and by charging them back a large overdraft would result. It was stipulated that the Georgia bank was not aware of the condition of the lumber company's account with the National Bank, and that it believed that the latter was a bank in good standing, well managed, and that its president was a person of integrity, of good business management, and deserving of trust and credit, but it also appeared that the keeping of checks and drafts afloat, corresponding in amount with checks cashed by the Georgia bank, was known to it, for in part they were sent to that bank with remittances for checks paid by it. In other words, when the National Bank sent the Georgia bank money or drafts in payment of checks cashed by the latter, it would also send for collection a corresponding draft or check of the lumber company. Checks drawn by the lumber company on the Georgia bank were employed in the kiting process; also drafts drawn by the lumber company upon itself. The time required for transmission of the collection items from Georgia to Minnesota and back again to Georgia made the plan feasible. The agreed statement of facts contained this clause: "When the First National Bank paid checks in cash and sent drafts therefor to its correspondent, if the drafts were paid, the said First National Bank saved the charges for exchange incident to

Digitized by Google

the shipment of actual money to keep up its balance in the hands of such correspondent."

Robert Mee, for plaintiff in error. Thomas H. Quinn, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILLIPS, District Judge.

HOOK, Circuit Judge (after stating the facts as above). It was known to both the National Bank and the lumber company that the credit and resources of the former were being used to uphold and further a venture in which it could not lawfully engage. But the question remains: How did it appear to the Georgia bank? Did it have the aspect of legitimate banking business or of a guaranty for another? The letter of September 6, 1904, purported to obligate the National Bank unconditionally to pay all checks of the lumber company up to the amount of $5,000 in any one week. No limitation was expressed in the letter that had regard either to the condition of the company's account, whether in credit or in debit, or to its future conduct or solvency. The president of the National Bank did not say he was confident the lumber company would not draw checks in excess of its rights as a customer, but that there was no reason for its drawing checks his bank would not honor. There was no pretense of a certification of checks in the customary meaning of that phrase. The certification of a check, like the acceptance of a draft, creates an original liability on the part of the bank upon which an action may be maintained, and it implies that at the time the check is certified the drawer has sufficient funds with the bank and that they have been set apart and will be retained for the holder, whoever he may be, and whenever the check may be presented. The bank undertakes that the check is good at the time it is certified, and that it shall continue so until finally paid. Though an officer may bind his bank by certifying a check in the absence of funds of the drawer, Congress has made the act a misdemeanor. U. S. Comp. St. 1901, p. 3497, § 5208. In some respects a certified check is not unlike a certificate of deposit payable to the order of the depositor. The customary and proper practice is for the certifying bank to at once charge the account of the drawer with the amount of the check, and thus protect itself against loss from its assumption of liability by completing the withdrawal of the amount from his further control. Merchants' Bank v. State Bank, 10 Wall. 604, 648, 19 L. Ed. 1008.

But the letter of September 6 had no reference to checks then in existence. The amount of checks that would be drawn in the future within the prescribed limit was not known, nor was there any definite time limit to the duration of the undertaking evidenced by the letter. The power of the bank to put an end to its continuing promise to pay checks of the lumber company was not a safeguard against loss. Under the terms of the letter a liability would arise in Georgia before it would be known in Minnesota. Regarded most favorably, the letter evidenced a transaction that was of doubtful regularity. Since the proper certification of a check signifies that the maker has sufficient funds with the bank, an agreement to certify checks to be drawn

Digitized by Google

in the future is so out of the usual banking course as to challenge attention.

The true purpose of the writer of the letter and the real relation between his bank and the lumber company was disclosed by the telegrams of the 6th and 22d of December. In the first of these the limit per week was raised to $10,000, and in the second the limit was entirely removed. In both telegrams the obligation attempted to be assumed by the letter of September 6th was referred to as a guaranty. Neither of the telegrams authorized the inference that the checks to be drawn by the lumber company were upon its funds then with the bank, or that payment depended upon funds being placed there by it. The first one is particularly significant, in that the undertaking was to "protect" checks of the lumber company for $5,000 per week in excess of "present guarantee." Even more significant of the true situation is the telegram of December 22d. It referred to the undertaking as a guaranty, and purported to bind the National Bank to pay all checks that might be drawn upon it within the given period without regard to the amount. This was manifestly beyond the power of the bank as it put at hazard, upon the mere act of the lumber company, the duty of the bank to the government, the interests of its shareholders, and the funds of its depositors. In this connection, it is said that the amount of the eight checks in controversy, $8,000, was within the limit prescribed by the telegram of December 6th, but these checks were drawn between December 27th and 31st, inclusive, and at that time the Georgia bank had before it the letter and both telegrams, and was therefore advised of the character of the obligation which the National Bank was attempting to assume. The letter and telegrams taken together were sufficient to advise the Georgia bank at the time it cashed the checks in controversy that the National Bank was lending its credit to the lumber company. If the latter had the right to draw the checks, and if it was the duty of the bank on which they were drawn to pay them, it would not have agreed to "protect" them or referred to its obligation as a "guaranty." The term "guaranty" has a different signification, and ordinarily a bank does not agree to protect a check which it is its duty to pay. Both terms employed pointed quite clearly to the real relation between the National Bank and the lumber company, and, if there was otherwise any doubt, the removal of all limit to the obligation attempted to be assumed should have dispelled it.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of notes or other obligations which it rediscounts or sells because to do so is incidental to the business it is authorized to transact, and to the disposition of property it has lawfully acquired. But it cannot lend its credit to another by becoming surety, indorser, or guarantor for him. It cannot for the accommodation of another indorse his note or guarantee the performance of obligations in which it has no interest. Such an act is an adventure beyond the confines of its charter, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. Commercial Nat. Bank v. Pirie, 82 Fed. 799, 27 C. C. A. 171; Bowen v. National Bank, 94 Fed. 925, 36 C. C. A. 553; Id., 87 Fed. 430. An act that is void because beyond the power of a national bank cannot be made good

Digitized by Google

FOURTH NATIONAL BANK OF DAYTON, OHIO.

$ 700.00/100 Dayton, Ohio, April 4th, 1904

Thirty days after date Pay to the

Order of Emily Smith

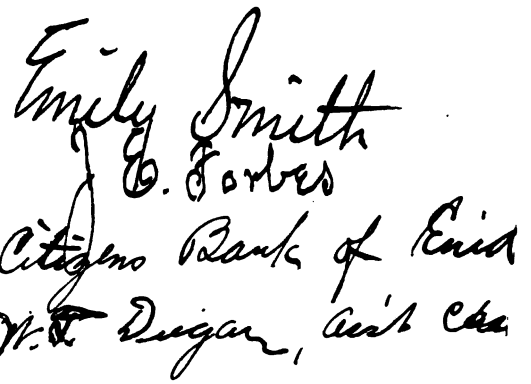
Seven hundred and no/100 Dollars

To Hanover National Bank,

No. New York, N. Y. Charles Adsit Cashier

URZ & CO., PRINTERS, 74 BROADWAY, NEW YORK.

Digitized by Google



Emily Smith transferred this draft by her blank indorsement to J. E. Forbes in payment for real estate which she had purchased of him. Forbes indorsed the draft in blank and deposited the same with the Citizen's Bank of Enid, Oklahoma. On April 19th, 1904, the Citizen's Bank of Enid, Oklahoma, indorsed the note and transferred it to the First National Bank of Enid, who is the holder and the plaintiff in this action, which was brought against all of the prior parties to the note, but only Forbes and the Citizen's Bank receiver were served. The note was transferred to the First National Bank of Enid by the Citizen's National Bank of Enid in settlement of a day's balances and it was shown that the Citizen's Bank, on the day on which this note was transferred, was in a failing condition and the First National Bank knew that the bank was in a failing condition. The First National Bank paid value for the note in that it received it as collateral security for an antecedent indebtedness. It received the note in due course and before maturity and if it was a purchaser in good faith, there is no doubt that it should recover from the prior parties to this note. It was not proved that the First National Bank knew in what manner the draft in suit was acquired by the Citizen's Bank from Forbes and in any event suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man are not the tests, but the test is did the purchaser in purchasing the note do so in good faith? Guilty knowledge and willful ignorance alike involve the result of bad faith. The mere fact that the First National Bank knew that the Citizen's Bank was in a failing condition, would not necessarily create the suspicion on the part of the First National Bank that the Citizen's Bank had acquired this draft fraudulently. There was nothing to indicate that the Citizen's Bank was not the holder of this draft, and had Forbes desired to make it appear that he still had an interest in the draft, he could have indorsed the draft for collection or for deposit. The court rendering this decision said Forbes had placed it in the power of the Citizen's Bank to transfer the draft as a negotiable instrument, and where one of two equally innocent parties must suffer, the one who has placed it in the power of the third party to do wrong must bear the consequence.

Digitized by Google

by estoppel. McCormick v. Market Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. It is urged that the National Bank profited by the transactions to the extent of exchange, and that it retained the benefit. It is difficult to find any profit to the bank in these transactions. If there was any, it was swallowed up in losses.

The judgment is affirmed.

Bills and Notes: Bona Fide Holder: Bad Faith, the Test.

The plaintiff, the First National Bank of Enid, sued the Fourth National Bank of Dayton, Ohio, the drawer of the illustrated draft, Emily Smith, the payee and first indorser, J. E. Forbes and Citizens' Bank of Enid, also the receiver of the Citizens' Bank of Enid, the other indorsers, for $700, which is the sum in which this draft is payable. The Citizens' Bank and Emily Smith were not served with process, consequently this action is practically against J. E. Forbes and the other defendants. Emily Smith transferred the draft to J. E. Forbes in payment for real estate, which she had purchased from him on April 4th, the day the draft was drawn. On April 19th the draft was brought to Enid, Okla., and having been indorsed by Forbes in blank, was deposited with the Citizens' Bank of Enid. The bank was in a failing condition and on April 20th went into the hands of the bank commissioner. The plaintiff, the First National Bank, was also engaged in the banking business in Enid and a clearance was had betwen the First National Bank of Enid and the Citizens' Bank of Enid and a balance was shown in favor of the First National Bank for the sum of $4,400. One W. T. Dugan, who was the assistant cashier of the Citizens' Bank, was managing the affairs of the Citizens' Bank at this time on account of the absence of the president and cashier of the bank. Mr. S. T. Goltry. was the president of the First National Bank. The Citizens' Bank issued to the First National Bank a draft on the City National Bank of Kansas City for the amount of the balance shown to be due the First National Bank, and Dugan, the assistant cashier of the Citizens' Bank, requested that the draft should not be forwarded for collection immediately because he was expecting a telegram from Kansas City which might inform him that the account of the Citizens' Bank in Kansas City had been changed to some other bank in Kansas City. About a quarter before five on April 19th, Goltry not having heard from Dugan, took the draft to the Citizens' Bank and asked him to make some other arrangements for the settlement of the day's balance. Dugan delivered to Goltry all the checks and drafts that the Citizens' Bank had received on that day, amounting to $3,200, including the draft in suit, and the balance was paid by a due bill

Digitized by Google

or cashier's check, which had as collateral a United States bond and a note for $1,000, executed by a local grocery company. There is no question but that Goltry was familiar with the failing condition of the Citizens' Bank. In fact the day before he had offered to assist the Citizens' Bank in its financial embarrassment. When Forbes learned of the failure of the Citizens' Bank on April 20th, he stopped payment of this draft. The court directed a verdict in favor of the plaintiff against the Citizens' Bank, its receiver and J. E. Forbes. Forbes appealed and the verdict was affirmed. There was no evidence that the plaintiff bank, the First National Bank, had any knowledge of how the Citizens' Bank acquired the draft from Forbes or whether or not the bank was a purchaser of the draft. The First National Bank paid value for the draft for the reason that it was taken as security for a pre-existing indebtedness which by the weight of authority in most State and federal courts constitutes value. The principal question in this case is whether or not the bank is a bona fide holder. The bank is a holder for value, and acquired the draft before maturity in due course, and the point to be solved in this case is whether or not the bank acted in good faith, and the court held that it did.

The court said in part:

"Plaintiff, by showing that it was a purchaser for value before maturity of said draft, established its right to recover thereon, unless such right be defeated by proof of notice of the equities of Forbes or of its bad faith. In Atlas National Bank v. Holm et al., 71 Fed. 489, 19 C. C. A. 94, the United States Circuit Court of Appeals of the Seventh Circuit said: 'There has been a contrarity of rulings on the subject, but the weight of authority has long been (in the federal courts, certainly since Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865) that one who takes an assignment of commercial paper before maturity, paying value, without notice of infirmity in the title of consideration, is deemed a good-faith purchaser, and that, to deprive him of that character, it is not enough that he neglected to make the inquiry which under the circumstances a prudent man would or ought to have made.'

"It is contended by plaintiff in error that the conduct of Goltry in going to the Citizens' Bank after banking hours and obtaining the draft in question, and the other items of remittance which had been received by the Citizens' Bank during that day and the government bond and a note in settlement of the balance due by the Citizens' Bank to the First National Bank, when Goltry had knowledge that the Citizens' Bank was in a failing condition, and that it had acquired said draft on that day, establishes the bad faith of the plaintiff in taking the draft. He contends that the circumstances under which the draft was obtained were such as should have created a suspicion in the minds of Goltry, and put him upon inquiry, and that his not having made inquiry of the assistant cashier of the Citizens' Bank as to how he obtained the draft establishes the bad faith of the plaintiff. We think this contention not well founded, for it has become the well-

Digitized by Google

established rule in the federal courts of the Union and in the greater number of State courts that suspicion of defect of title or even gross negligence on the part of a taker of a negotiable instrument will not defeat his title. Atlas National Bank v. Holm et al., supra; Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857; Hotchkiss v. National Banks, 21 Wall. (U. S.) 354, 22 L. Ed. 645; Clark v. Evans et al., 66 Fed. 263, 13 C. C. A. 433; Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. Ed. 934; 1 Daniel on Negotiable Instruments, 766. In Murray v. Lardner. supra, Mr. Justice Swayne, speaking for the court, said: 'The possession of such paper carries the title with it to the holder. The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith.' In Goodman v. Harvey, 4 Ad. & El. 870, it was held that gross negligence might be evidence tending to show mala fides and as such admissible, but that it did not in itself amount to proof of mala fides, and was not sufficient to deprive the holder of his right to recover. In Hamilton v. Vough, 34 N. J. Law, 187, it was held that, when mala fides is the point of inquiry, suspicious circumstances must be of substantial character, and, if such circumstances do not appear, the court can arrest the inquiry, and that the circumstances must be strong so that bad faith can be reasonably inferred. The court in that opinion used this language: 'To preserve the negotiability of commercial paper and guard the interest of trade, it is absolutely necessary that large power should be placed in the judicial hand when the question arises as to what facts are sufficient to defeat the claim of the holder of a note or bill which has been taken before maturity, and for which value has been paid. It is only in this mode that the requisite stability in transactions of this kind can be retained.' The circumstances that surround the transfer of the draft in this suit by the Citizens' Bank to the plaintiff tend to prove that the plaintiff had knowledge of the failing condition of the bank, but these circumstances are not sufficient to fasten upon the plaintiff a strong suspicion that the draft in question had been fraudulently obtained. There are various ways by which this draft could have been acquired by the Citizens' Bank on the day of its failure and been obtained without fraud. It could have been delivered to the bank in payment of an indebtedness. The bank could have paid cash for it. The bank could have given exchange on other banks for it. There was nothing in the face of the draft to indicate that Forbes had any interest therein. He had delivered the same to the bank as a negotiable instrument. It was within his power, if he had so desired, to have indorsed the same for collection and deposited it, and thereby have given notice to all into whose hands the draft should come that

Digitized by Google

he had an interest in the same, but he did not do so. He placed it within the power of the Citizens' Bank to transfer it as a negotiable instrument, and to treat it as its property. If one of two equally innocent persons must suffer from the wrong conduct of a third person, the one who places it within the power of the third person to commit the wrong should suffer. There is not the slightest evidence in the record that Goltry had any knowledge whatever of how the bank had obtained the draft from Forbes, nor was there evidence to impute to him guilty knowledge of such facts or wilful ignorance thereof. The fact that the evidence may show that Goltry had such knowledge as might have made him suspicious that the Citizens' Bank was in a failing condition, that he acted diligently in an effort to collect the balance due by the Citizens' Bank to plaintiff, does not prove bad faith. This he had a right to do, and the evidence must show, in order to defeat a recovery, that the plaintiff bank knowingly participated in the perpetration of frauds upon Forbes by the Citizens' Bank, or that it did so in wilful ignorance. It was held by the Court of Appeals of New York, Magee v. Badger and Another, 34 N. Y. 247, 9 Am. Dec. 691, that the duty or act of inquiry does not rest upon the purchaser of commercial paper to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by the issue as to his intelligence or ignorance. Bona fides is defined in Norton on Bills and Notes (page 306) in the following language: "'Bona fides' or 'good faith' is a term used as a mere distinction from 'mala fides,' or 'bad faith.' If paper be purchased without anything which the law can construe into notice, it is spoken of as being purchased in good faith. Where, on the contrary, the purchaser has what the law construes to be notice of defects or equities, then he is a purchaser in bad faith, and can secure to himself none of the advantages given to the bona fide purchaser; but bad faith means nothing more than participation in the fraud, and resolves itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith.'" Tiedeman on Bills and Notes (page 256), in speaking of the two different rules that have prevailed in the courts upon what constitutes a bona fide holder, uses this language: 'But the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the bona fide character of a holder can be destroyed only by proof of participation in or actual knowledge of the fraudulent or illegal character of the instrument.' It is contended by plaintiff in error that by his introducing evidence that the possession of the note by the Citizens' Bank had been obtained from him by fraud, thereby shifting the burden to the plaintiff to show that he was a bona fide holder for value, the court was precluded from instructing the jury to return a verdict in favor of plaintiff. We cannot agree with this contention of plaintiff in error. It is true that, when the maker or indorser of a negotiable instrument establishes that the execution or transfer of the same was procured by fraud, he prima facie establishes a defense until overcome by evidence of the holder of the instrument that he is a purchaser for value before maturity in good faith, and, upon his doing so, the burden of proving notice of the fraud is then shifted to the defendant. There being no testimony in this case that the First National Bank had notice of the fraud practiced by the Citizens'

Digitized by Google

Bank upon the defendant, Forbes, in the procuring of the draft in controversy, and it having been established that the First National Bank paid full value for the draft before maturity, defendant's defense is reduced to one of bad faith, on the part of the First National Bank, and, since the evidence introduced does not establish bad faith. it was within the power of the court to direct a verdict. 'The question is one simply of good faith in the purchaser; and, unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict for the holder.' Norton on Bills and Notes, 303."

See Decision No. 1089.

Bills and Notes: Agency: Knowledge of Agent Attributed to Principal.

One Twining, who was a president and a director of the Monmouth Trust & Safe Deposit Company, was also a director of the First National Bank of Asbury Park. He persuaded Samuel Johnson and others, who were co-directors with him of the First National Bank of Asbury Park, to sign a promissory note for $10,000, in order that the bank might be carried over until it received returns from its discount with other banks, it being temporarily in need of funds. Mr. Twining expressly agreed with the defendants upon the note that the note was not to be negotiated until the signatures of certain other directors of the First National Bank had been obtained. Notwithstanding his agreement, Mr. Twining discounted the note with the Monmouth Trust & Safe Deposit Company, and the note not being paid, this action was brought to recover by John E. Lanning, receiver of the Monmouth Trust & Safe Deposit Company. It transpired that Twining discounted this note without consulting the board of directors of the First National Bank of Asbury Park, and that he was not authorized by the board in any way either expressly or impliedly or by so acting on previous occasions to do the thing that he did do. Judgment was rendered for the plaintiff and the defendants appealed, defendants contending that the fact that Twining discounted the note without obtaining the other signatures which he had agreed to obtain was a fraud upon the defendants, and that the knowledge of Twining that the note was fraudulently negotiated was the knowledge of the Monmouth Trust & Safe Deposit Company of which he was the president and a director. There is no question but that the fraud in the note was proved, and if the knowledge of Twining is the knowledge of the Monmouth Trust & Safe Deposit Company, the Monmouth Trust & Safe Deposit Company would not be an innocent holder for value and as such, protected against the fraud. The judgment of the lower court was affirmed by the Supreme Court of New Jersey.

Digitized by Google

The court said in part:

"It has frequently been declared in other jurisdictions that there is a distinction between knowledge of illegality or want of consideration of a note by a director who acts with his board in discounting it and such knowledge on the part of a director who is not present and acting with the board when the discount is made; and that in the former case the bank is bound by his knowledge, and in the latter case it is not. Many of the cases so holding will be found collected in the opinion of Depue, J., in First National Bank of Hightstown v. Christopher, 40 N. J. Law, 435, 29 Am. Rep. 262. It is upon the principle which is considered to underlie this distinction that the defendants rest their claim of non-liability. But the distinction claimed to exist has been condemned, as we understand the opinions hereafter referred to, by our Court of Errors and Appeals. In the case of Sooy v. State, 41 N. J. Law, 394, the sureties upon the bond of a State treasurer sought to escape liability for his defalcation upon the ground that the Legislature had knowledge, at the time of the execution and delivery of the bond, that the treasurer was then a defaulter, and that it had failed to communicate this fact to the sureties. Such knowledge on the part of the Legislature was attempted to be shown by proving that the fact had been communicated to one of the members of that body. It was decided that, 'in a matter wherein the Legislature properly acts as an agent of the State, notice to members of the Legislature individually is not notice to the State. Such notice, to bind the State, must be given to one of the legislative branches in organized session.' The underlying rule upon which this decision was rested is stated in the opinion to be that the knowledge of the agent is chargeable upon the principal only when the principal, if acting for himself, would have received notice of the matters known to the agent. In the late case of Vulcan Detining Co. v. American Can Co., (N. J. Err. & App.) 67 Atl. 339, the same court affirmed the rule laid down in Sooy v. State, and held that the defendant company was chargeable with knowledge of facts acquired by its president while a director of the complainant company only so far as it would itself have acquired such knowledge of dealing directly, or through another agent, with the complainant company concerning the subject-matter of the controversy. At the same time it expressly repudiated the doctrine laid down by us in the earlier case of Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788, viz, that where information is casually obtained by an agent of a corporation, and the corporation afterward acts through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal. On the strength of those two cases, therefore, it would seem that, if the note in controversy had been discounted by the board of directors of the trust company while Twining was present as a member thereof, the trust company would not be chargeable with notice of its fraudulent conduct in procuring its discount. But the fact that the note was discounted, not by the board of directors, but by Twining himself, he taking advantage of his position as president to usurp the function of the board without authority from them, makes it unnecessary to determine the question discussed: for it can hardly be held that, where a transaction takes place without either the knowledge or authority of the board, the

Digitized by Google

$519.25 Hardy, Arkansas, May 8, 1905

On February 1, 1906 after date I promise to pay to the order of W. E. Smith

Five hundred and nineteen and 25/100 Dollars

at Sharp County Bank, Hardy, Arkansas

Value received Thomas W. Jones

No. Due J. A. Wilson

Digitized by Google

Pay to the order
of R. M. Jackson
W. E. Smith.

R. M. Jackson, the holder of this note, sued the makers, Jones and Wilson. The makers set up a failure of consideration and fraud which had been perpetrated upon them by the payee, W. E. Smith, and they further alleged that the holder of the note had notice of the failure of consideration and fraud. The plaintiff demurred to the answers of the defendants and the demurrers were sustained on the ground that the answers did not state that the plaintiff had participated in the failure of consideration and the fraudulent transfer of the instrument. The Supreme Court of Arkansas held that it was unnecessary that the holder of the instrument should have participated in the acts complained of to defeat his recovery upon a promissory note, but that it was sufficient if the holder had notice of the failure of consideration and the fraud or knowledge of facts which would put him on inquiry, although it is held that if the holder had pursued the inquiry without substantiating the general notice of defect, he could have claimed protection as a bona fide holder. It is not necessary, in order to establish mala fides, that the holder should have notice of the particular defect in the note, if he have notice that there is something wrong with the paper and that the same will not be paid or notice of circumstances which would lead the average man to investigate further. The judgment of the trial court sustaining the demurrer was overruled on appeal.

Digitized by Google

board is chargeable with notice of facts known to their self-constituted agent, but not communicated by him to them. The rule to show cause will be discharged."

See Decision No. 1090.

Bills and Notes: Bona Fides: Innocent Holder.

The plaintiff in this action is R. M. Jackson, the indorsee of a promissory note similar to the illustration. Jackson sued the makers, Thomas W. Jones and J. A. Wilson, who had executed the note to the order of W. E. Smith. The answer of Jones and Wilson set up that the note was fraudulently procured by W. E. Smith, and that the holder, R. M. Jackson, had notice of the lack of consideration, and, therefore, that the holder was not an innocent holder for value. The defendants, the makers of this note, Jones and Wilson, were induced to purchase a mercantile business and this was in payment of a balance due the party from whom they purchased. It was alleged that the goods sold to the defendants were defective and not as represented and incumbered by a mortgage when the vendor had represented that the goods were unincumbered. When defendants learned of the fraud which had been perpetrated upon them, they notified the holder of this note and told him that they would not pay the note. The plaintiff demurred to the answers of the defendants and his demurrers were sustained and the plaintiff obtained judgment and the defendants appealed. The difference between a bona fide holder and a mala fide holder is stated in the quotation from the decision of the Supreme Court of Arkansas which we set forth below.

The court said in part:

"The allegations, in substance, charge that Jackson had notice of the fraud, false pretense, and intimidation perpetrated upon the defendant by Smith, and that Jackson was informed that the note was fraudulently obtained, and was without consideration, and warned not to buy or trade for the same, and all the circumstances and fraud practiced on Smith in obtaining said note, and also that Smith would not pay it. Counsel for appellee argues that these allegations do not present a defense, because they do not allege that the holder of the note participated in the acts complained of or in the fraudulent transfer of the instrument, or bad faith on his part in the purchase of it, and relies upon Thompson v. Love, 61 Ark. 81, 32 S. W. 65, to sustain him. That was a suit upon a note given to a hedge fence company. Its execution was admitted, and the defense made that it was fraudulently procured and the holder was not a bona fide purchaser. There was evidence to sustain the allegation of fraud in the procurement of the note. The case turned on whether the purchaser was a bona fide purchaser. The only evidence bringing notice home to him was information which he received to the effect that the makers of this and other similar notes were solvent and good for their contracts,

Digitized by Google

but that the payee of these notes had agreed not to sell them. The court, following Burke v. Dulaney, 153 U. S. 233, 14 Sup. Ct. 816, 38 L. Ed. 698, correctly decided that this was insufficient to make the purchaser a mala fide holder. The court has had occasion recently to re-examine the principles of Burke v. Dulaney and has again approved them, in Graham v. Remmel, 76 Ark. 140, 88 S. W. 899. It is unquestionably true that mere notice of a promise not to negotiate a note does not prevent a purchaser for value in due course of trade being a bona fide purchaser, for he must have knowledge, not of some oral contemporaneous promise which is inadmissible in evidence, but of something wrong with the paper itself. This notice actual or constructive, must be that there is some fraud or equity or illegality affecting the original parties. Tiedeman on Commercial Paper, § 300; 1 Daniel on Negotiable Instruments (5th ed.), § 799; Old Nat. Bank of Ft. Wayne v. Marcy, 79 Ark. 149, 95 S. W. 145. Following the excerpt from Burke v. Dulaney, the court in Thompson v. Love, then made a quotation from Tiedeman on Commercial Paper, § 289, concluding as follows: 'But the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the bona fide character of a holder can only be destroyed by proof of his participation in a fraudulent transfer of the instrument." This quotation is from the discussion as to what constitutes bona fides in a purchaser. There was a conflict, or rather a progress, in the English decisions on the subject. One rule was laid down by Lord Kenyon, subsequently overruled by Lord Chief Justice Abbott (Lord Tenderden), and this was, in turn, modified and finally overruled by Lord Denman, when he was Chief Justice, and the rule as first announced by Lord Kenyon amplified and established. Chancellor Kent, when he wrote his Commentaries, stated the law as it then existed, following the cases then prevailing in England, but which were afterwards overruled; and his text has been followed by some of the courts, but in most instances overruled later, making the rules substantially the same on both sides of the water. This subject is treated more fully in 1 Daniel on Negotiable Instruments (5th ed.), §§ 770, 776. It was reviewed and explained in Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857, which case has been followed very generally by State as well as federal courts. See the notes to it in 6 Rose Notes, 388, 394. The discussion was as to what should constitute mala fides — negligence, gross negligence, suspicious circumstances, or participation in the original fraud or fraudulent transfer, etc. The discussion was not as to the notice which was necessary to bring home to the party sought to be charged knowledge of fraud. That matter is considered in another section of Tiedeman on Commercial Paper (section 300), and concludes as follows: 'Finally, it is not necessary that the purchaser should have notice of the particular defense or defect in order to be charged with constructive notice. It is sufficient if he has a general notice that there is something wrong with the paper. But, if he makes inquiry bona fide and to the extent of his ability, without substantiating the general notice of defect, he can claim the protection of a bona fide holder.' Mr. Daniel says: 'It is quite clear and well settled that the purchaser need not have notice of the particular fraud or equity or illegality in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is

Digitized by Google

some fraud or equity or illegality affecting the original parties. . . . So, if he knows, the maker denies his liability or refuses to acknowledge it.' Daniel on Negotiable Instruments (5th ed.), § 799. The foregoing statement of the principles was adopted by this court recently in the case of Old Nat. Bank of Ft. Wayne v. Marchy, 79 Ark. 149, 95 S. W. 145. The statement from Tiedeman's text, quoted in Thompson v. Love, when detached from the statement that notice of something wrong with the paper is sufficient to charge the purchaser with notice, is misleading; but, when considered in connection with it, is correct. It was error for the court to sustain these demurrers, for the answers alleged that the purchaser had knowledge that the makers denied liability and of circumstances tending to show fraud in the contraction of the debt which the notes evidenced, before he purchased the paper for value before its maturity. These facts, if proved, would make him a mala fide, and not a bona fide, purchaser."

See Decision No. 1091.

Bills and Notes: Corporation Check Given in Payment of Individual Indebtedness: Bona Fides.

In the April Quarterly of 1907 we publihsed at page 177a the decision of the Appellate Division of the State of New York in this case. The case was decided by a divided vote of the Appellate Division, three judges voting for an affirmance of the judgment and two judges dissenting. The case was carried to the Court of Appeals, and the Court of Appeals reversed the judgment of the Appellate Division by a divided vote of five to two. The case originated in the Supreme Court of the State of New York and was referred to a referee, whose opinion was adopted by the majority of the Appellate Division as its own in affirming the judgment. It is apparent by the above history of the case that the courts of this State have been considerably shaken by the propositions of law involved in the case. One Umsted and Kiefer purchased all of the stock of the Hartman Manufacturing Company, borrowing $125,000 of the City Trust Company, in order to do it, upon their promissory note and pledging as collateral the stock which they had purchased. They misrepresented to the trust company the price which they paid for the stock, the trust company being led to believe that they paid a much higher figure than the actual consideration, which was $110,000. Umsted was elected president of the corporation and Kiefer was elected its secretary and treasurer. In order that the trust company might keep in touch with the corporation's affairs, a director and a representative of the trust company were put upon the board of directors of the Hartman Company. The loan of the City Trust Company was for six months and before the maturity of the loan Umsted and Kiefer desired to renew it, but the trust company was unwilling to renew it, but consented

Digitized by Google

to its being paid before maturity. Umsted and Kiefer managed to borrow for the Hartman Company of the Hanover Bank $200,000, which was also secured by the stock of the Hartman Company and the Hartman Company's promissory note indorsed by Umsted and Kiefer. Umsted and Kiefer induced the Hanover Bank to issue its check payable in $125,000 to the order of the Hartman Company to enable them to pay the loan to the City Trust Company, which they represented to the Hanover Bank was an indebtedness of the Hartman Company. The balance of the loan, $75,000, was placed to the credit of the Hartman Company on the books of the Hanover Bank. Umsted indorsed the check for $125,000, which was payable to the Hartman Company, in the name of the Hartman Company by himself as president, and the check was delivered to the City Trust Company in payment of the note made by Umsted and Kiefer. The Hartman Company subsequently became insolvent and its property was sold and a large balance due the creditors was left unpaid. The claims of the unpaid creditors were assigned to the plaintiff, Charles M. R. Ward, who obtained judgment against the Hartman Company, and an execution being returned wholly unsatisfied, this action was brought by Mr. Ward against the City Trust Company to recover the $125,000, which had been paid to the City Trust Company by a check payable to the Hartman Company. It is a settled rule of law that a person receiving the check of a corporation in payment for the individual indebtedness of an officer of that corporation, takes it with notice that it is being unlawfully used. Corporation checks should only be used in payment of corporation indebtednesses. In this instance a check payable to the Hartman Manufacturing Company was given in payment of a personal indebtedness of Umsted and Kiefer to the City Trust Company, therefore the City Trust Company took with notice of the unauthorized use of the check. The City Trust Company was put upon inquiry. The referee, however, found that although the City Trust Company was put upon inquiry, still, had it pursued this inquiry, it would have discovered nothing to rebut the presumption of an authorized use. The law is well settled that where a person receives a negotiable instrument with notice of a defect, and is put upon inquiry, and he subsequently makes no inquiry, he is entitled to protection if it can be shown that the inquiry, which he should have made, would have resulted in his obtaining no knowledge that the instrument was fraudulently, illegally or unlawfully used. In this case the referee held that an inquiry would not have resulted in the trust company's obtaining knowledge of the unauthorized use of the check, for the reason that Umsted and Kiefer were the sole owners of the stock and the direction of all of the affairs of the corporation had been placed in the hands of Umsted. The referee dismissed the complaint of the plaintiff with costs and his judgment was

Digitized by Google

affirmed by the Appellate Division. The Court of Appeals, however, in reversing the judgment of the Appellate Division held that had the City Trust Company pursued the inquiry which it ought to have pursued it would have discovered that the Hartman manufacturing Company was insolvent, and that notwithstanding the fact that Umsted had the right to act for the stockholders of the company, as well as the directors, he could not dispose of the property of the corporation in contravention of the rights of the creditors. The rights of the creditors were supreme, and in transferring the property of the corporation Umsted was taking property away from the corporation which could have been used in the payment of its indebtednesses.

The decision follows in full:

WARD v. CITY TRUST COMPANY OF NEW YORK et al.

(Court of Appeals of New York. April 14, 1908.)

84 N. E. 585.

BILLS AND NOTES — NOTICE TO TRANSFEREE — CORPORATE PAPER — TRANSFER BY OFFICER — BONA FIDE PURCHASERS — RIGHTS — ABSENCE OF INQUIRY — EVIDENCE — GOOD FAITH — "BAD FAITH" — CORPORATIONS — TRANSFER OF ASSETS — RIGHTS OF CREDITORS — RATIFICATION — USE OF STOCK.

1. Where a bank in making a loan to a corporation delivered to the corporation's president a cashier's check payable to the corporation, which the president indorsed in his official capacity, and delivered to a trust company in payment of an individual loan made to himself and another, the form of the check was notice to the trust company that the president of the corporation was using corporate property to pay his personal debt in apparent violation of its rights, the effect of which notice was to put the trust company on inquiry to determine whether the president of the corporation was authorized so to use its funds both as against a corporation and its creditors.

2. Where a cashier's check tendered in payment of a debt was sufficient on its face to excite suspicion as to the right of the payer to so use the check, the creditor in accepting the check without inquiry was still entitled to the rights of a bona fide purchaser, if reasonable inquiry would have led to the knowledge of facts which would have dispelled the presumption of illegal use, but was also chargeable with knowledge of such unfavorable facts as reasonable inquiry would have discovered in relation to the defect that made the inquiry necessary.

3. Defendant trust company loaned $125,000 to U. and K. to purchase the stock of a corporation, which amount was equal to one-half of its entire capital. This loan was made in consideration of an usurious rate of interest, and also an additional bonus, the trust company requiring a transfer of the stock as collateral, and also two representatives on the board of directors. When the debt matured U., as president of the corporation, procured a larger loan from a bank for the corporation's benefit, and as a part of the proceeds received a cashier's check payable to the corporation, which he indorsed as its president and paid to the trust company in payment of its loan to himself and K. as individuals and for a surrender of the

Digitized by Google

stock. Held, that the trust company was bound to inquire through its representatives on the board of directors of the corporation concerning U.'s actual or implied power to so use the corporation's assets, and since such inquiry would have disclosed no such authority, but would also have shown that such use of the corporation's property would render it insolvent, the trust company was not a bona fide purchaser either as against the corporation or its creditors, under Negotiable Instruments Law, Laws 1897, p. 732, c. 612, §§ 91, 94, 95, declaring bad faith to consist of notice of facts which, if unexplained, would show that the purchaser was taking property to which the payer had neither right nor title.

4. A corporation even by joint action of all its officers, directors, and stockholders cannot authorize the voluntary application of the corporation's assets to the individual debts of its officers to the prejudice of creditors of the corporation.

5. The president and secretary-treasurer of a corporation having borrowed money from a trust company individually to pay for the corporation's stock, and deposited the stock as collateral security, thereafter obtained a surrender of the stock by paying the loan with a cashier's check payable to the corporation, which the president indorsed to the trust company without authority. The trust company accepted the check without inquiry, and the corporation becoming insolvent, the president's interest in the stock was transferred to a reorganizing committee in consideration of a release of a claim of the corporation's creditors against the president's wife in respect to other property, after which this stock was voted by the creditors in the process of reorganizing the corporation and consolidating it with certain others. Held that since, when the stock was pledged to the trust company and surrendered, it was pledged and surrendered as the individual property of the president and secretary of the corporation, and not as the property of the corporation, and when transferred and voted by the reorganizing committee, it was still not the property of the corporation, the corporation's creditors and assignee were not estopped by such use of the stock to sue the trust company to recover the amount of such cashier's check as a misappropriation of the corporation's assets.

Haight and Gray, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Charles M. R. Ward against the City Trust Company of New York, impleaded with the Hartman Manufacturing Company. From a judgment of the Appellate Division (117 App. Div. 130, 102 N. Y. Supp., p. 50) affirming a judgment on the report of a referee dismissing the complaint, plaintiff appeals. Reversed, and new trial ordered.

Thomas Thacher, for appellant. Morgan J. O'Brien, for respondent.

VANN, J. In March, 1901, Frank A. Umsted, but recently a salesman in the employ of the Hartman Manufacturing Company, a Pennsylvania corporation, and William L. Kiefer, a lawyer, borrowed $125,000 of the defendant the City Trust Company, a New York corporation, in their own names, and for their own benefit. They had previously aranged to purchase the entire capital stock of the Hartman Company of the face value of $250,000 for $110,000, and they used enough of the proceeds of the loan to pay for such stock, which they pledged as collateral to their promissory note given to secure the loan. The trust company knew that the bulk of the money was to be used to pay for the stock, although it believed that the purchase

Digitized by Google

price was much larger. The interest reserved was at the rate of 14 per cent. a year, and a commission of over $5,000 was paid in addition. As a condition of the loan, which was procured by misrepresentation and fraud on the part of Umsted and Kiefer, Chapman, a director, and Plummer, a representative of the trust company, were elected directors of the Hartman Company to look after the interests of the former until the loan should be paid. At the same time Umsted was elected president and Kiefer secretary and treasurer. No part of the proceeds of the loan was turned over to the Hartman Company, or used for its benefit, nor was any representation made that it was procured, or was to be used in its behalf. The period of credit was six months, and about sixty days before it expired Umsted and Kiefer applied to the trust company for another loan, which was refused, but consent was given to the payment of the note before maturity. Thereupon Umsted, on the 2d of August, 1901, falsely representing that the loan from the City Trust Company for $125,000 "had been made for the Hartman Company," procured a loan for the latter from the Hanover Bank for $200,000, which was secured by the promissory note of the Hartman Company, indorsed by Umsted and Kiefer, and the certificates of all the stock of the Hartman Company were pledged as collateral. In paying over the proceeds of that loan the Hanover Bank delivered to Umsted, at his request, to enable him to pay the loan to the trust company and redeem the certificates of stock, its check for $125,000, payable to the order of the Hartman Manufacturing Company, and placed the balance of $75,000 to the credit of that company on its books. Umsted indorsed the check in the name of the Hartman Manufacturing Company by himself as president and general manager, and delivered it to the City Trust Company in payment of the note made by himself and Kiefer. The Hartman Company received no consideration for the use made by Umsted of said check. The note as well as the certificates of stock pledged as collateral thereto were surrendered to Umsted. The money lent was out of the possession of the trust company only from March 27th until August 2d, so that the interest actually received was at the rate of more than 20 per cent. per annum. At the time of this transaction Umsted, as president of the Hartman Company, had been authorized by a resolution of the board of directors "to take charge of all the property and business of the company" and to make and sign "all checks, notes, contracts, and other obligations of the corporation." After adopting said resolution the directors held no futher meetings until after all rights involved in this action had become fixed and unchangeable. Umsted transacted all the business of the company. There was no by-law of the Hartman Company, nor any resolution of its board of directors, authorizing the use of its money or assets to pay other than corporate obligations, or ratifying the use made of said check. Between three and four months after the check had been so used the Hartman Company failed, and all its property, except its alleged right to recover from the City Trust Company said sum of $125,000, was sold at the instance of a reorganization committee composed of creditors, and the proceeds, amounting to $238,000, applied proportionately upon its debts, leaving still unpaid the sum of $371,140.29. The remaining claims of the various creditors were assigned to the plaintiff, who recovered judgment against the Hartman Com-

Digitized by Google

pany for the amount thereof, and an execution issued thereon was returned unsatisfied. Said judgment is wholly unpaid. Of that indebtedness the sum of $226,840.62 was in existence on the 2d of August, 1901, and prior to the date of the withdrawal from the assets of the Hartman Manufacturing Company of said sum of $125,000 used to pay the debt of Umsted and Kiefer to the City Trust Company for that amount. That withdrawal made the Hartman Company insolvent, and the object of this action was to recover from the trust company the sum thus misappropriated.

The referee before whom the action was tried, after finding the foregoing facts in substance, further found that the trust company acted in good faith, with no intent to hinder, delay, or defraud the creditors of the Hartman Company; that the form of the cashier's check was notice to the trust company that the money represented thereby was the property of the Hartman Company; that the trust company, knowing that Umsted and Kiefer owned all the capital stock of the Hartman Company, and believing that they were authorized to dispose of said check, made no inquiry as to the authority of Umsted as president and general manager to use the same in payment of the individual debt of himself and Kiefer, or as to the financial condition of the Hartman Company, or whether the effect of the withdrawal of $125,000 from its assets would make it insolvent; that if reasonable inquiry had been made it would have disclosed the said resolution of the board of directors; that no meeting of the board had since been held, and that Umsted, after the passage thereof, had had the exclusive control of the business of the company. It was also found that the law of Pennsylvania is the same as the law of New York in the respect that the amount of the assets of a corporation over and above its liabilities are in equity a trust fund held by the corporation for the benefit of creditors; that so far as the rights of creditors are concerned in this case there is no difference between the law of New York and the law of Pennsylvania; and that by the law of the latter State the directors of an insolvent corporation may authorize a sale of all or any of its assets without authority from the stockholders thereof. The referee found as conclusions of law that the trust company was a bona fide holder for value of said check for $125,000; that it obtained a good title thereto as against the Hartman Company and its creditors; and that the plaintiff is not estopped to maintain this action by the use made by the reorganization committee of the certificates of capital stock of the Hartman Company. The complaint was dismissed on the merits, with costs.

Upon appeal to the Appellate Division the judgment was affirmed by a divided vote upon the opinion of the referee, which, together with the dissenting opinion of Mr. Justice Scott, concurred in by Mr. Justice McLaughlin, may be found reported in 117 App. Div. 130, 102 N. Y. Supp. 50. Reference is made to these opinions for a more detailed statement of the facts, which were fully found and clearly stated.

The main question presented for decision is whether the facts found, when all are considered together, support the conclusions of law. The form of the check in question was notice to the trust company that Umsted was using the property of the corporation of which he was president to pay the personal debt of himself and Kiefer in apparent violation of its rights. Rochester & Charlotte Turnpike Road

Digitized by Google

Company v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; Hathaway v. County of Delaware, 185 N. Y. 368, 372, 78 N. E. 153, 113 Am. St. Rep. 909. The effect of such notice was to put the trust company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim. The presumption arising from the face of the check was that it belonged to the Hartman Company, and that its president had no right to use it to pay his personal debt. The purpose of the law in exacting inquiry under such circumstances is to see whether the apparent situation is the actual situation, or, in other words, to learn whether facts exist to rebut the presumption. The object is not to discover negative facts, or such as would not arouse suspicion, but positive facts which would allay the suspicion already aroused. If, for instance, reasonable inquiry had been made by the trust company, and the result had tended to show that the check really belonged to Umsted and Kiefer and not to the Hartman Company, or that Umsted was authorized by that company to use it as he proposed, then, even if the fact were otherwise, such inquiry would have tended to rebut the presumption of illegal use, and to protect the title of the trust company. The law goes further than this in order to promote the transfer of commercial paper, for it is settled that if no inquiry is in fact made to dispel the presumption, but reasonable inquiry would have led to the discovery of facts which would have dispeled it, the purchaser of the paper is entitled to the benefit thereof the same as if he had learned them by proper investigation. Wilson v. Metropolitan Elev. Ry. Co., 120 N. Y. 145, 153, 24 N. E. 384, 17 Am. St. Rep. 625. This benefit, however, carries with it the burden of responsibility for such unfavorable facts as reasonable inquiry would have discovered in relation to the defect that made the inquiry necessary. Cohnfeld v. Tanenbaum, 176 N. Y. 126, 130, 68 N. E. 141, 98 Am. St. Rep. 653; Rochester & Charlotte Turnpike Road Co. v. Paviour, 164 N. Y. 281, 286, 58 N. E. 114, 52 L. R. A. 790; Seger v. Farmers' Loan & Trust Co., 187 N. Y. 314, 319, 79 N. E. 977. In the case before us no inquiry was made, although the check was for so large an amount as to induce a prudent man to proceed with caution. The transaction upon its face involved a gift to Umsted and Kiefer, or the theft by them, of a large portion of the assets of the Hartman Company, and under such extraordinary circumstances reasonable inquiry meant one prosecuted with a degree of diligence adapted to those circumstances. Inquiry of Umsted and Kiefer would not have satisfied the requirement, for it was apparent that they were acting in their own interest, and hence beyond the general scope of their authority. Bank of New York National Banking Association v. American Dock & Trust Co., 143 N. Y. 559, 564, 38 N. E. 713. The trust company had ample opportunity to learn all the facts, for it had representatives on the board of directors of the Hartman Company, the apparent owner of the check. According to the custom of business men, and especially of banks, the first inquiry would have called for a resolution of the board of directors authorizing Umsted to use the check to pay his own debts. The minute book of the board was open to examination by the representatives of the trust company, but when examined it would have shown no such authority, for the resolution relied

Digitized by Google

upon, broad as it was, simply authorized Umsted as president to take charge of the property and business of the company, and to sign checks, notes, and other obligations in its behalf. This meant that he could do these acts only in transacting the business of the company, for no other construction would be reasonable. There was no suggestion of permission to give away the assets of the company, or to use them to pay the personal debts of its officers. Such dangerous power, which might involve the ruin of the company, cannot be conferred unless the intention is expressed with the utmost clearness. "If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." Bank of New York Nat. Banking Ass'n v. Am. Dock & Trust Co., 143 N. Y. 559, 564, 38 N. E. 713, 714.

The next inquiry would naturally have been whether Umsted had implied authority, to be inferred from similar acts and past conduct known to the directors of the corporation, and not objected to by them, but that inquiry would have disclosed nothing to rebut the presumption. There is no evidence that Umsted, before his misappropriation of the check in question, had ever used the property of the corporation he represented to pay his own debts or otherwise than in the transaction of its business. No fact of any kind would have been discovered, because none existed, to show authority, express or implied, and the presumption would therefore have stood in full force. While inquiry would have discovered that Umsted had full power to act for the corporation in all its corporate business, it would not have shown that he had the right, either real or apparent, to use the check in question in payment of the debt owing by himself and Kiefer to the trust company. If an officer of that company "had made the inquiry, he would have learned the facts already stated. He is therefore chargeable with all that these facts import, or which is fairly to be inferred from them." Cohnfeld v. Tanenbaum, 176 N. Y. 126, 130, 68 N. E. 141, 98 Am. St. Rep. 653. If the check had been regular on its face, that is, if it appeared to have passed through the hands of the Hartman Company, and thence into the channels of commerce, as in a case relied upon by the respondent, then, even if offered in payment of his personal debt by one of the officers of the company, the taker without notice would have the right to assume that the relations of the various parties to the paper were what they appeared to be. Cheever v. Pittsburgh, Shenango & Lake Erie R. R. Co., 150 N. Y. 59, 66, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646. The case before us, however, is utterly different, for the check showed on its face that it did not belong to Umsted or Kiefer, but to the Hartman Company. As was said in the Paviour Case, supra: "There was a shadow on the checks, and the defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicions which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are care-

Digitized by Google

ful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint." According to the facts found by the referee, when all are read together, we think that proper inquiry by the trust company or its officers would not have shown that Umsted possessed the authority which he assumed to exercise, but, on the contrary, that he had no such authority, either express or implied.

Thus far we have confined the discussion to the rights of the Hartman Company, and to the authority or want of authority of its president to use the check for his own benefit. The rights of creditors, however, were also involved, for the Hartman Company was insolvent, yet the transaction on its face indicated a gift by that company to Umsted and Kiefer of $125,000, or precisely one-half of its capital as it stood at the time. While Umsted and Kiefer owned all the stock, and Kiefer ratified whatever Umsted did, still the rights of creditors remained, even if the corporation and its stockholders were ready to give away every right within their power. Hurd v. N. Y. & Com'l Steam Laundry Co., 167 N. Y. 89, 95, 60 N. E. 327; Cole v. Millerton Iron Co., 133 N. Y. 164, 168, 30 N. E. 847, 28 Am. St. Rep. 615. It was not enough for the trust company to part with value by surrendering the note and collateral, for it was bound to act in good faith in order to get good title. Negotiable Instruments Law, §§ 91, 94, 95, Laws 1897, p. 732, c. 612. Bad faith in taking commercial paper does not necessarily involve furtive motives, for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who, to quote again from Paviour Case, "owed him nothing, in payment of a claim that he held against some one else. . . . Even if his actual good faith is not questioned, if the facts shown to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the law will withhold from him the protection that it would otherwise extend." The trust company had notice that apparently it was dealing with a donee, who had no title to the check as against creditors, or with a thief, who had no title as against any one. It knew the Hartman Company was a heavy borrower, and that there were creditors with large claims. It knew the enormous rates of interest that these men had promised to pay when they procured the loan, as well as the payment by them of about $5,000 in addition as a commission to Plummer, its representative, who aided the borrowers in procuring the loan. It knew through Chapman and Plummer, with whose knowledge it was charged, that the company was heavily involved. The presumption was against the transaction, and, as we have seen, unless that presumption was overcome by reasonable inquiry, the transaction, unlawful in fact, and unlawful on its face, is presumed to have been known to the trust company to be unlawful. The duty of inquiry extended to all the facts and defects suggested by the form of the check, and hence went beyond the question of authority and included the rights of creditors. As was well said in the dissenting opinion below, to which we are greatly indebted: "Primarily, the capital of a corporation is held

Digitized by Google

for the protection of its creditors, and is impressed with a trust in their behalf, and the directors cannot lawfully, nor can the stockholders, divert the funds of a corporation to the individual use of its members, if thereby the capital is impaired and the corporation rendered insolvent." Hurd v. N. Y. & Comc'l Steam Laundry Co., 167 N. Y. 89, 60 N. E. 327; Germania Safety Vault & Trust Co. v. Boynton, 71 Fed. 797, 19 C. C. A. 118; Matter of Prospect Worsted Mills, (D. C.) 126 Fed. 1011; National Trust Co. v. Miller, 33 N. J. Eq. 155. To these carefully selected authorities cited by Mr. Justice Scott there may properly be added the pioneer case in this State — Bartlett v. Drew, 57 N. Y. 587. The trust company was charged with knowledge of the law that a corporation, even with the consent of all its stockholders, cannot give away its property, provided there is not enough left to pay its debts. The form of the check and its amount when compared with that of the capital stock required investigation or inquiry as to the solvency of the company. That inquiry, honestly and diligently made, would have shown that the Hartman Company was insolvent, or would become so by the withdrawal of so large a part of its capital as the check represented. Even if, as the learned referee held, although erroneously, as we think, the trust company had the right to assume that Umsted and Kiefer, as the sole owners of the stock, could lawfully use the assets of the corporation for their own purposes, still the assumption would necessarily be limited to the corporation itself. It could not extend to creditors whose rights are supreme, and which cannot be sacrificed even by the joint action of all the officers, directors, and stockholders of the corporation. We do not need to consider the rights of "future creditors," for the claims of "existing creditors" exceed in amount the sum misappropriated.

The learned counsel for the respondent contends that the plaintiff, although a creditor, armed with judgment recovered and execution unsatisfied, is not entitled to maintain this action because the creditors, who are his assignors, used new stock of the Hartman Company, issued in place of that surrendered to Umsted, to reorganize that corporation and another, the capital stock of which it had purchased. This contention was properly overruled by the referee, and we adopt his reasons for such action, which we quote from his opinion: "Nor can I find, as urged by the learned counsel for the defendant, that the subsequent use of the stock in being voted upon for the purpose of an increase of the capital, or its being transferred to a third party for the benefit of the creditors or of the corporation through the intervention of Mr. Chapman after it was discovered that the corporation was in bad financial condition, or its subsequent transfer to the receiver of the corporation for its benefit, in any way operates to make this surrender of the stock to Umsted and Kiefer a purchase by the corporation, or to estop in any way the plaintiff from maintaing this action, if otherwise he could maintain it. What was done with the stock after it was delivered to Umsted and Kiefer was done by them as owners, and not in any sense by the corporation. The final surrender of Umsted's interest in the stock seems to have been in consideration of a release of a claim of the creditors against his wife in respect to other property. These questions, however, like many other questions of fact and law that were fully and

Digitized by Google

ably discussed on the trial and summing up of the case, are not material to the disposition of the main issues in the case, as I understand them." The stock that was pledged to secure the note of the City Trust Company, and to redeem which the check for $125,000 was paid, was not the property of the Hartman Company. The company did not own its own stock, but it was owned by the two stockholders who had borrowed the money from the trust company, and in no respect was it essential to the contemplated increase of the capital stock of the corporation that the pledged stock should be acquired by the Hartman Company or canceled. Hence the surrender of the stock did not inure to the benefit of the Hartman Company in any way.

The finding of fact made by the referee that the trust company acted in good faith, and with no intention to defraud the creditors of the Hartman Company, when considered with his other findings, is inconsistent therewith, and the appellant is entitled to rely upon those most favorable to himself. City of Buffalo v. Del., L. & W. R. R. Co., 190 N. Y. 84, 98, 82 N. E. 513.

As thus construed, the facts found do not warrant the conclusion of law that the complaint should be dismissed. We are therefore constrained to reverse the judgments below, and order a new trial, with costs to the appellant to abide event.

HAIGHT, J. (dissenting). The Hartman Manufacturing Company was incorporated under the laws of the State of Pennsylvania with a capital stock of $250,000, consisting of $100,000 of preferred stock, and $150,000 of common stock. In the spring of 1901 Frank A. Umsted purchased from the owners all of the capital stock for the sum of $110,000. Thereupon he arranged with William L. Kiefer, a lawyer, to take a third interest therein, and together they applied to and obtained a loan of $125,000 from the defendant the City Trust Company, upon their promissory note, payable in six months, secured by a pledge of the certificates representing the entire capital stock of the company. To induce the trust company to make the loan, it was represented by Umsted and Kiefer that the loan was desired to enable them to pay the balance due from them to the persons from whom they had purchased the stock, the price of which was $350,000; that there were no claims, liens, or incumbrances against the property of the company, and that the cash assets, consisting of bills receivable, cash, open accounts, raw materials, and unfinished stock, exceeded the total liabilities by at least $40,000; that the business was very prosperous; and that dividends had been paid on the stock of the company ranging from fourteen to twenty-three per cent. per annum, the dividend for the last year having been nineteen per cent. After acquiring the stock of the company Umsted was elected its president, and by resolution he was placed in charge of the property of the corporation and made the general manager thereof, and all checks, notes, contracts, and other obligations of the corporation were required to be made and signed by the president or by the secretary and treasurer. On the 2d day of August thereafter Umsted applied to the Hanover National Bank for a loan to the Hartman Company of $200,000, to be secured by the promissory note of that company, indorsed by himself and Kiefer, and in making such application he

Digitized by Google

stated to the Hanover National Bank, for the purpose of procuring the loan, that the Hartman Company needed additional banking credit for the character and extent of the business; that it desired to enlarge its business and increase its capital stock; that Kiefer and he had borrowed of the City Trust Company $125,000 for the Hartman Company on their promissory note secured by a pledge of the capital stock of the company, and he asked the Hanover National Bank to give him as a part of said loan a cashier's check for $125,000 with which to pay said loan to the trust company. Thereupon the Hanover National Bank made a loan in accordance with the offer and delivered a cashier's check to Umsted for $125,000, with which Umsted went to the City Trust Company, indorsed the same, and delivered it to the trust company in payment of the loan made by that company to himself and Kiefer, and procured a surrender to him of all of the stock of the corporation which the trust company held as security for the loan. This payment was made with the knowledge and consent of Kiefer, who, in writing, approved of the payment out of the loan made by the Hanover National Bank, and, inasmuch as Umsted and Kiefer were then the owners of all of the stock of the corporation, it follows that the payment was made with the consent and approval of all the stockholders. This, to my mind, disposes of all of the questions raised and discussed with reference to the authority of Umsted to make the payment in question. His authority was, in effect, the same as if he had been expressly authorized so to do at a meeting of the board of directors. It consequently follows that the question remaining for consideration pertains to the rights of the creditors of the corporation existing at that time. As to such creditors we have the representations made by Umsted and Kiefer to the trust Company at the time the $125,000 was borrowed, the financial condition of the Hartman Company, its prosperity, earnings, and dividends declared, to which attention has already been called, and the further fact that so far as the Hanover National Bank is concerned, it was expressly informed at the time the application for the loan was made that it was for the purpose in part of enabling Umsted and Kiefer to take up their promissory note and the stock pledged by them for its payment, to the end that they might enlarge the business of the company and increase it capital stock, and that the loan from the trust company was made by Umsted and Kiefer upon their personal promissory note. The findings are to the effect that the City Trust Company believed these representations to be true at the time it made the loan to Umsted and Kiefer, and that it had no knowledge that the company had subsequently become insolvent, and that in accepting the cashier's check of the Hanover National Bank in payment for the note held by it, and the surrender thereupon of the stock of the company, it acted in good faith, and consequently became a bona fide holder of the cashier's check for value.

Again, this is an equitable action, brought for the purpose of obtaining purely equitable relief, and the relief demanded by the plaintiff is the payment to him by the trust company of the $125,000 received by it through the payment of the cashier's check of the Hanover National Bank. It appears from the findings that after the trust company had surrendered the capital stock of the Hartman Company

Digitized by Google

to Umsted and Kiefer upon the payment of its promissory note Umsted and Kiefer procured an increase of the capital stock to be made from $250,000 to $2,500,000, and that they had purchased the property of the Shelby Steel Tube Company at Newcastle, Penn., at a cost of $80,000, which was less than its real value, and had also purchased the entire capital stock of the Cuyahoga Steel & Wire Company for $250,000, on which they had paid the sum of $125,000, and had expended a large sum of money in substituting new machinery in the plants purchased. It further appears that after trouble had arisen with reference to meeting the obligations of the corporation as they matured and became due a meeting of the creditors was held, and at such meeting a committee of such creditors was appointed, consisting of William Logan of the Hanover National Bank and others, to reorganize the Hartman Company and the Cuyahoga Steel & Wire Company, and that thereupon, at the request of the committee, Umsted and Kiefer transferred all of the capital stock of the Hartman Company to the persons designated by the committee, and such new stockholders, in the interests of the committee of the creditors, authorized a sale of the property of the corporation other than the claim now in suit, and that the same was bought in by the plaintiff in this action, to whom the claims of these creditors had been previously assigned, for the sum of $238,000. It thus appears that by reason of the transfer of the stock of the corporation to the committee appointed by the creditors they were enabled to vote the stock, elect new directors, and control and manage the affairs of the company. They were enabled, not only to direct the sale of the property, but also to prescribe the terms of the sale and arrange for its transfer to their own assignee, deriving therefrom a material and substantial benefit to themselves, thereby depriving the trust company of the protection that it otherwise would have had, had it still held and controlled the stock of the corporation. To hold that these creditors, including the Hanover National Bank, whose claims are represented by the plaintiff, may now recover from the defendant the amount of this claim, after they have reaped the benefit derived from the control of the stock of the corporation, which had been surrendered by the trust company, would, to my mind, be most inequitable and unjust.

I, therefore, favor an affirmance of the judgment.

CULLEN, C. J., and WERNER, HISCOCK, and CHASE, JJ., concur with VANN, J. GRAY, J., concurs with HAIGHT, J.

Judgment reversed, etc.

Checks: Prompt Presentment for Payment: Liability of Indorser.

The following decision of the highest court of the State of Vermont holds that where the holder of a check was negligent in presenting the same for payment, and sued the indorser, who is also the payee, to recover, that he could not recover for the reason that he had delayed presentment for payment, even though it was shown that if the check had been promptly presented it would not have been paid.

Digitized by Google

This case draws a distinction between an action against the drawer of a check and one against the indorser of a check. The drawer knows whether or not there are funds on deposit sufficient to meet the check, whereas the indorser relies upon the sufficiency of funds of the drawer in the bank to meet the check, and the indorser is not liable if the check is not promptly presented for payment because he might, if he were promptly notified that the check would not be paid, secure himself in some way so that he would not have to pay the check. However, if the indorser knows at the time when he passed the check that there were or would be no funds of the drawer in the bank to meet the check, a different situation would arise and the indorser would be liable.

The decision follows in full:

START v. TUPPER.

(Supreme Court of Vermont. Franklin. March 2, 1908.)

69 Atl. 151.

BILLS AND NOTES — PRESENTMENT OF INDORSED CHECK FOR PAYMENT — DILIGENCE REQUIRED — LIABILITY OF INDORSER.

1. The considerations on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer are not applicable to an indorser, since the drawer is presumed to know the insufficiency of the fund, while the indorser is entitled to rely on its sufficiency.

2. The liability of the indorser of a check is impliedly conditioned on its prompt presentment for payment and notice of non-payment, and a failure in those respects will discharge him, even though presentment in due course would have been unavailing, unless it affirmatively appears that he knew when he passed the check that there were or would be no funds in the bank to meet it.

Exceptions from Franklin County Court; Willard W. Miles, Judge.

Action by O. G. Start against T. L. Tupper. Judgment for plaintiff, and defendant excepts. Reversed and remanded.

Argued before ROWELL, C. J., and TYLER, MUNSON, and WATSON, JJ.

Lee S. Tillotson, for plaintiff. Tupper & Start, for defendant.

MUNSON, J. On the 22d of August, 1906, the defendant, the payee of the check in suit, delivered it to the plaintiff, duly indorsed, in payment of a pre-existing indebtedness of less amount, and received the difference in cash. The check was dated August 20th, and was drawn on a bank in Melrose, Mass. The plaintiff held it for six days before forwarding it for collection. It was presented and protested for want of funds September 4th. August 24th was the last day on which payment would have been made. The case states that the defendant is sued as indorser. Most of the facts, including those above recited, were shown by an agreed statement. The evidence before the jury was with reference to what "the usual commercial

Digitized by Google

way now in use," required of the bank through which the check was forwarded, and when the check would have been presented for payment if it had been received by the collecting bank on the 23d of August and had been forwarded in the way required. Several exceptions were taken to the admission and rejection of testimony. The defendant rested, without offering evidence, and moved for a verdict; and his motion was overruled on the ground that the defendant was not damaged by the plaintiff's neglect, inasmuch as the check would not have been paid if forwarded in due course. The plaintiff then moved for a verdict on the ground indicated, and a verdict was ordered accordingly, to which the defendant excepted.

It is not necessary to consider the exceptions relating to the evidence. The agreed statement shows a failure to forward in due course, and this is decisive of the case presented. The considerations on which the holder of a check drawn without funds is permitted to excuse his neglect as against the drawer are not applicable to an indorser. The drawer is presumed to know the insufficiency of the fund, while the indorser is entitled to rely on its sufficiency. The drawer is the one primarily liable, and prompt presentment and notice of non-payment may enable the indorser to secure himself. The indorser's liability is impliedly conditioned on this being done, and a failure therein will discharge him, even though presentment in due course would have been unavailing. In default of presentment and notice, an indorser can be charged only by affirmative proof that he knew when he passed the check that there were or would be no funds in the bank to meet it. Daniel, Neg. Inst., §§ 1587, 1596, 1646; Humphries v. Bicknell, 2 Litt. (Ky.) 297, 13 Am. Dec. 268; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43; Nash v. Harrington, 2 Aikens, 39.

Judgment reversed and cause remanded.

Usury.

The following decision holds that a note, which is payable twelve months after date, is not usurious even though it is provided that if the interest is not paid annually it shall become as principal and bear the same rate as the principal. The debtor may avoid this penalty and discharge the debt by paying the principal and interest upon the maturity of the note, and if he does not do so this provision for the payment of interest upon unpaid interest is in the nature of a penalty to induce him to pay the note at its maturity.

The decision follows in full:

CARNEY v. MATTHEWSON et al.

(Supreme Court of Arkansas. April 13, 1908.)

109 S. W. 1024.

USURY — AGREEMENT NOT USURIOUS.

A note payable twelve months after date, with interest at the rate of 10 per cent. per annum, and providing that, if interest be not paid annually, it shall become as principal and bear the same rate of interest, is not usurious.

Digitized by Google

Appeal from Chancery Court, Marion County; T. H. Humphreys, Chancellor.

Action by W. B. Matthewson and another against B. J. Carney on a note. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sam Williams, for appellant. Woods Bros., for appellee.

HILL, C. J. The sole question involved in this appeal is whether the contract evidenced by the following note was usurious: "$300.00. Yellville, Ark., Nov. 23, 1903. Twelve months after date I promise to pay to the order of Angel Matthewson Three Hundred Dollars, for value received, negotiable and payable without defalcation or discount and with interest at the rate of ten per cent. per annum, and if interest be not paid annually, to become as principal, and bear the same rate of interest. Interest and principal payable at Bank of Yellville. Secured by deed of trust, which is a second lien on 166x210 of ground in Sec. 9, Tp. 18 N. R. 17 W. B. J. Carney."

This note was payable in twelve months after date, and the interest upon the interest only became due, according to the contract, in the event payment was not made pursuant to the promise. "Stipulations to the effect that, if the debt be not paid at maturity, it shall draw interest thereafter at a rate greater than the statutory limit, are now generally regarded as penalties to induce prompt payment, and, as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such agreements are held to be free from usury." 29 Am. and Eng. Encyc. of Law (2d ed.) 507; Webb on Usury, § 119. "The true test is: Has the debtor the absolute right to discharge and satisfy the contract at maturity by paying the principal debt and lawful interest? If he has, the contract is not vitiated by providing for the payment of an additional sum." 29 Am. and Eng. Encyc. of Law (2d ed.) 506. This is in conformity with the principle announced in Chaffe v. Landers, 46 Ark. 364. Moreover, this is not such a compounding as would render the note usurious. This subject is fully discussed in Grider v. Driver, 46 Ark. 50, and First Nat. Bank v. Waddell, 74 Ark. 241, 85 S. W. 417.

Judgment affirmed.

HAMMOND, SNYDER & CO. v. AMERICAN EXPRESS CO.

(Court of Appeals of Maryland. January 8, 1908.)

68 Atl. 496.

BILLS AND NOTES — ACTIONS — DECLARATION — PRESENTMENT FOR PAYMENT — TIME — CUSTOMS AND USAGES — VARYING TIME OF CONTRACT — ACCEPTANCE — LAW GOVERNING — EVIDENCE — PRESUMPTION — LAWS OF FOREIGN COUNTRIES — COSTS — COUNSEL FEES — ALLOWANCE — GROUNDS.

1. A declaration in an action on a foreign draft on its face presents a good cause of action, where it avers direction to defendants to pay to the order of the drawers the amount stated, indorsement to plaintiff of the draft with a bill of lading attached, the presentation, acceptance, and dishonor and notice thereof to defendants, sale of the grain covered by the bill of lading and failure of the proceeds to pay the draft in full.

Digitized by Google

2. Where a draft at sixty days' sight is drawn against a consignment of wheat, the fact that it has a bill of lading for the wheat attached, and contains the words, "to be surrendered upon payment of this bill before maturity under discount on or before the arrival of vessel," will not change the time of maturity.

3. A custom or usage cannot be permitted to be shown in order to fix a different maturity from that plainly appearing on the face of a draft.

4. The payment of a draft is regulated by the laws of the place where it is accepted to be paid.

5. In the absence of an allegation that the law of the place of payment of a draft payable in a foreign country differs from the local law, it will be presumed to be the same as regards the method of payment and matters incidental thereto.

6. In an action on a foreign draft, in which no issue of fact was made up and heard, but the real controversy was disposed of upon issues of law made by demurrers which were argued by counsel, and the defendants withdrew their pleas, allowing judgment by default, there was such trial of the case as would bring it within Acts 1890, p. 463, c. 433, providing that "if the defendant shall dispute the whole or any part of the plaintiff's demand, . . . and upon trial of the case, the plaintiff shall recover a judgment for any portion of his demand so disputed, then the plaintiff shall be allowed reasonable counsel fees."

Appeal from Baltimore City Court; Henry Stockbridge, Judge.

Action by the American Express Company against Hammond, Snyder & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, and BURKE, JJ.

Charles W. Heuisler and E. Allen Sauerwein, for appellant. John Philip Hill, for appellee.

SCHMUCKER, J. This suit was instituted in the Baltimore City Court under the rule day act by the appellee company against the appellant firm to recover alleged balances due on two foreign drafts or bills of exchange drawn by them. The two drafts are similar in form, and for like amounts, and they were both drawn on Arthur Hughes & Co., of Dublin, against a consignment of wheat shipped by the Lord Dufferin, and to each draft was attached an order bill of lading for 8,000 bushels of the wheat. The drafts were in the following form:

Sixty days after sight of this first exchange (second of the same tenor and date unpaid) pay to the order of ourselves thirteen hundred and seventy-three pounds % sterling.

Value received and charge the same to account of Dcmts to be surrendered upon payment of this bill before maturity under discount on or before arrival of vessel.

8000 bus. wheat
Lord
Dufferin

To Messrs. Arthur Hughes & Co.,
Dublin.

Hammond, Snyder & Co.

The drafts, with the documents attached, were sold and indorsed by the appellants to the appellee, and were by it on November 5, 1906, duly presented for acceptance to the drawees, who accepted them in writing across the face of each draft the words: "Accepted

Digitized by Google

from Nov. 5th, 1906. Payable at Lloyds Bank, London. Arthur Hughes & Co." The grain arrived at Dublin on November 28, 1906. The bills of lading attached to the drafts were not delivered to Hughes & Co. on the acceptance by them of the drafts, but were retained by the appellee until the expiration of sixty days and three days of grace, and were then presented for payment to Lloyds Bank in London, and were dishonored, of which their makers, the appellants, had due notice. The appellee then sold the grain represented by the bills of lading, and, the net proceeds not proving sufficient to pay the drafts, it instituted the present suit to recover the deficiency.

The appellants, as defendants below, demurred to the narr., and, their demurrer having been overruled, they filed four pleas with appropriate affidavits of defense and certificates of counsel. The first and second pleas presented the general issue. The third plea alleged by way of equitable defense that the drafts sued on were the means employed by the defendants to collect from Arthur Hughes & Co. the price of grain sold to them under a contract, of the form of the London Corn Trade Association, which contained a clause requiring the grain to be paid for on or before the arrival of the vessel subject to discount, or at the seller's option by buyer's acceptance of shipper's drafts at sixty days from the date of arrival in London of the drafts with documents attached; that under such contracts it had long been the custom of the trade for buyers of American grain to take up the drafts with the accompanying documents on the arrival of the vessel, with grace if it arrived within sixty days from the date of acceptance; that the plaintiff, having in the course of its business long been a purchaser of foreign drafts, many of them drawn under contracts containing clauses such as that set out in the plea, knew or ought to have known of the said usage as to the maturity of the drafts, and ought, therefore, to have presented them for payment on the arrival of the vessel with grace, but it failed to do so, and held them until sixty days after their acceptance with grace, and only then presented them for payment. The fourth plea differed from the third, in that it averred that by virtue of the presence on the face of the drafts of the memorandum there appearing, which was taken from the form of contract of the London Corn Trade Association, the appellee knew that the drafts matured on the arrival of the vessel with grace, and it should have presented them for payment at that time, but it failed to do so. The plaintiff joined issue on the first two pleas, and demurred to the last two, and the court sustained its demurrer. The defendants then filed their fifth and sixth pleas also by way of equitable defense. The fifth plea differs from the third in averring that the plaintiff knew that other bills of exchange drawn by the defendant in similar form matured and were retired on the arrival of the vessel with grace, and that the plaintiff knew that it was its duty to so present these drafts for payment, but failed to present them until the expiration of sixty days from their acceptance. The sixth plea differs from the fourth in averring that, by a usage covering more than fifteen years between the defendants, and the firm of Smith, Hammond & Co., who were their predecessors in business and those with whom they dealt in the corn trade, their drafts against shipments of grain had been uniformly drawn in the same form as those sued on in this

Digitized by Google

case and had been retired upon the arrival of the grain at its port of destination with grace, provided the vessel arrived within the period named in the bills, and that the plaintiff, by reason of its dealing in such drafts, should have had full knowledge of the usage, but it failed to so present the drafts for payment on the arrival of the vessel with grace in accordance with the usage. These special pleas were rather long ones, but we have stated their substance. The plaintiff demurred to the fifth and sixth pleas, and the court sustained the demurrer. The defendants thereupon withdrew their first and second pleas, and the plaintiff took judgment against them by default for want of pleas and affidavit of defense, and, the judgment having been extended, the defendants took the present appeal.

There was no error in overruling the demurrer to the declaration, which on its face presented a good cause of action. It averred in proper detail, in reference to each draft, that the defendants thereby directed Arthur Hughes & Co. to pay to their order the amount therein stated, and that the defendants indorsed to the plaintiff the draft with the bill of lading attached thereto, and then averred the presentation, acceptance, and subsequent dishonor of the draft, and the due notice thereof to the defendants, the sale of the grain covered by the bill of lading, and the failure of the net proceeds of the sale to pay the draft in full. Those facts, if duly proven, would have justified a verdict in favor of the plaintiff for the amount of the deficiency shown by the evidence. The special pleas reveal the true theory upon which the appellants sought to defend the suit. That theory, briefly stated, was that by the terms of the contract for the sale of the grain, or the usage of the trade in the course of which the sale was made, the maturity of the drafts drawn against the proceeds of the grain was so accelerated that they became payable on the arrival at its destination of the vessel with the grain on board, if it arrived, as it in fact did, before the expiration of the period named in the draft for its payment. The theory further assumed that the appellee was so affected with knowledge of the terms of the said contract of sale or usage of the grain trade, by the fact of its having frequently bought other drafts of like character or by the presence of the memorandum appearing on the face of the drafts in the present case, that it became its duty to present the drafts for payment on the arrival of the vessel, and that its failure to do so discharged the defendants as indorsers of the draft from all liability thereon. In other words, the pivotal question presented by the appeal is whether the maturity of the drafts in the hands of the appellee was accelerated by the facts alleged in the pleas. Upon the answer to that question the case must turn.

The question is presented to us by the record in two phases. They are whether by the proper construction of the drafts themselves in their present form, it was the duty of the appellee to present them for payment on the arrival of the vessel, and, if that be answered in the negative, whether its duty in reference to their presentation for payment was modified by the terms, as alleged in the plea, of the sale of the grain against whose proceeds the drafts were drawn or the usage of the export corn trade. It is plain that if the words, "to be surrendered upon payment of this bill before maturity under discount on or before arrival of vessel," did not appear on the face of

Digitized by Google

the drafts, they would by their own terms fix their maturity at sixty days after sight and their holder would have been under no obligation to present them for payment before that time. Nor should the fact that they were drawn against the proceeds of the wheat and had the bill of lading for it attached to them change the date of maturity fixed by the drafts themselves. This would certainly be true if the bills of lading be regarded as having been attached to the drafts as collateral security. The function of such security is to furnish a guaranty for the performance of the terms of the principal obligation, and not to effect a change in those terms, which remain the same as if no security had been given for their performance. If, on the other hand, the drafts, in the hands of the appellee as a bona fide holder for value, are affected by the fact, alleged in the pleas, that they were the means employed by the appellants to collect the price of the wheat covered by the bills of lading, still the appellants themselves fixed the date when that price should fall due by drawing the drafts at sixty days after sight.

If we turn now to the memorandum appearing on the face of the drafts, and inquire into its true significance, we find that it simply provides for the surrender of the bills of lading attached to the drafts upon the payment of the latter under discount either on or before the arrival of the vessel. It is obvious from the memorandum that the bills of lading were not intended to be surrendered until the payment of the drafts, because by its terms the obligation to surrender them is conditioned upon such payment. It cannot be successfully contended that this memorandum, whether it be held to operate as a condition or an agreement, should be construed to accelerate the maturity of the drafts; for by its express terms it relates only to the event of their payment "before maturity." The contents of the memorandum suggest that the purpose of placing it upon the drafts was to warn their holders that they must have the bills of lading ready to surrender, and must be prepared to submit to a discount on the drafts if the acceptor desired to exercise the option which it gave him of paying them before maturity. Admitting the right of the acceptor, in common with other debtors, to prepay his obligations in full, he could not, in the absence of the memorandum on the drafts, have executed a discount from their face value for their prepayment.

Nor do we think that the terms of the contract of sale of the wheat against whose proceeds the drafts were drawn can be imported into the drafts, or held to modify or control their plain language, merely because the bills of lading for the wheat were attached to the drafts. This is quite a different case from that of the Nat. Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208, which was much relied on in argument before us by the appellants. In that case the question was whether, when a plain time draft, without any memorandum on its face, had been drawn against a consignment of cotton to order, and had been forwarded to an agent for collection with the bill of lading for the cotton attached without any further instructions, it was the duty of the agent to deliver the bill of lading to the drawee of the draft upon its acceptance by him, or to hold the bill until the payment of the draft. It was there held that the agent could not expect the consignee of the cotton to accept the draft

Digitized by Google

for its price, unless he was furnished with the bill of lading in order to obtain possession of the cotton. The court there held that it was to be inferred from the facts of the case before it that the transfer of the bill of lading to the agent had not been made to secure the payment of the draft. It was, moreover, distinctly held in that case that if the owner of the draft had instructed the agent to retain the bill of lading until the payment of the draft, and he had surrendered it upon the acceptance of the draft, he would have been liable to the owner for a breach of duty. In the present case, not only are we dealing with a bona fide owner for value of the drafts, instead of a mere agent for their collection, but it is manifest, both from the nature of the memorandum on the face of the drafts and from the fact that their drawee accepted them without demanding or receiving the bills of lading, that it was the intention of the parties that the appellee should retain the bills of lading until the payment of the drafts; in other words, the bills of lading were attached to the drafts as collateral security for their payment. Under these circumstances, the bills of lading must be regarded as having been attached to and transferred with the drafts to secure the performance of the terms of the latter, and their presence should not be held to have the effect of modifying or changing those terms. The drafts were the primary obligations to which the bills of lading were merely incidental and collateral.

Neither do we think the existence, if such there were, of a trade usage or custom of the kind set up in the pleas, could be shown to accelerate the maturity of the drafts. By their own terms, expressed in plain language, the drafts did not mature until the expiration of sixty days after sight; i. e., after acceptance. That fixed the date upon which the holder was bound to present them for payment, and at which, if they were dishonored, he was to notify the prior parties thereto if he wished to hold them liable on the drafts. The liability of those parties being secondary and contingent upon proper presentation of the drafts and notice of their dishonor, it was essential that there should be no uncertainty as to the date of their maturity. To permit a custom or usage to be shown fixing a different maturity from that plainly appearing upon the face of the drafts would be to introduce into the contracts made by the drafts a provision inconsistent with one of the most vital of their express terms. It is well settled that this cannot be done. Denton v. Gill & Fisher, 102 Md 407, 62 Atl. 627, 3 L. R. A. (N. S.) 465; Foley v. Woodside & Mason, 6 Md. 49. The drafts having been drawn in Maryland upon a drawee residing in Dublin, who accepted them payable in London, the English law, as the lex fori, would regulate the method of their payment and the matters incident thereto; but, in the absence from the record of any allegation that the general propositions of the English law applicable to the subject differ from those in force here, they will be presumed to be the same. State v. P. & C. R. Co., 45 Md. 46; Dickey v. Pocomoke Bank, 89 Md. 297, 43 Atl. 33. The court below, acting under the authority conferred by chapter 433, page 463, Acts 1890, allowed the plaintiff's attorney a counsel fee of $50. The provisions of the act are as follows: "If the defendant shall dispute the whole or any part of the plaintiff's demand (in any action brought under the provisions of the three foregoing sections) and upon trial

Digitized by Google

of the case the plaintiff shall recover a judgment for any portion of his demand so disputed, then the plaintiff shall be allowed (in addition to the costs of the suit) reasonable counsel fees (to be fixed by the court; said fees not to be less than $25 nor more than $100)." We see no error in the allowance of this fee. No issue of fact was made up and heard in the case, it is true; but the real controversy between the parties was disposed of upon the issues of law made by the demurrers which were argued by counsel and determined by the court. The fact that at the end of the proceedings the defendants withdrew their pleas, and allowed judgment by default to go against them, did deprive the case of its controversial character. The defendants disputed the plaintiff's claim, and forced its counsel to try the issues arising from the dispute. It is not material that the pleadings resulted in issues of law upon which the defendants elected to make their final stand in the court below. There was in our opinion a "trial of the case" within the meaning of the law.

The judgment appealed from will be affirmed.

Judgment affirmed, with costs.

WALTERS v. ROCK.

(Supreme Court of North Dakota. February 21, 1908.)

115 N. W. 511.

BILLS AND NOTES — DEFENSES — FRAUD — BURDEN OF PROOF — NOTICE — BONA FIDE PURCHASER — ABSENCE OF GOOD FAITH — QUESTION FOR JURY — DEPOSITIONS — MOTION TO SUPPRESS — TIME TO OBJECT — NAMES — INITIALS — IDENTITY OF WITNESS — EVIDENCE — EXPERT TESTIMONY — PLEADING — OBJECTIONS — CONSTRUCTION.

1. Where fraud in the inception of a promissory note is alleged and established, the burden falls upon the indorsee to show that he is a purchaser in good faith for value and before maturity.

2. A promise made by the payee of a note in reference to the consideration for giving the same that he does not intend to fulfill constitutes a fraud that will defeat the note except in the hands of an innocent holder.

3. If a purchaser of a note for value before maturity has notice of facts tending to show defenses to the same, he cannot purposely refrain from making inquiries as to the inception of the paper, and at the same time claim to be a bona fide purchaser.

4. Payment of value on a purchase of negotiable paper before maturity constitutes prima facie a bona fide purchase, but no more.

5. Circumstances may rebut such prima facie presumption, and good faith in the purchase may be wanting, although the purchase was made before maturity and for value.

6. The fact that the purchaser does not expressly state that he purchased in good faith is not necessarily fatal to defeat a showing of good faith, but the omission to so state is a fact which may be considered in connection with other facts to show the absence of good faith in the purchase.

7. Whether the purchase was made in good faith is ordinarily a question for the jury, and it is held in this case that the verdict was sustained by evidence bearing on the question of bad faith.

Digitized by Google

8. If a purchaser of negotiable paper has knowledge of defenses before he pays for it, he is not a bona fide purchaser, although the note may have been indorsed and delivered to him before such knowledge.

9. A written motion to suppress a deposition as a whole is too late when filed with the clerk after the trial court has ordered a jury called, although the clerk has not drawn or called the name of a juror.

10. The statute requires such motions or objections to be made before the commencement of the trial, and as the requirement is intended to facilitate the despatch of business, and to give an opportunity for retaking the deposition if suppressed, a construction of the statute that the trial has commenced when a jury is called is reasonable, and gives effect to such intention.

11. The fact that the notice to take depositions gave the initials of the Christian names only, and the name was given in the deposition and subscribed by the witness by his Christian names, the first letters of which were the same as the initials given in the notice, does not make extrinsic proof necessary to show that the witness testifying is the same as the one described in the notice, especially where the officer taking the deposition indorses the same name on the envelope in which the deposition is inclosed as the one given in the notice.

12. An expert witness may give an opinion based in part on what was stated to him by the patient.

13. An expert may give an opinion based on the testimony of other witnesses that he has heard, or that has been read to him, in case there is no conflict in the facts testified to by such other witnesses.

14. More liberality is allowed in favor of the allegations of a pleading where objected to for the first time at the trial than when attacked by demurrer.

(Syllabus by the Court.)

Appeal from District Court, Traill county; C. A. Pollock, Judge.

Action by A. N. Walters against Jacob Rock. Judgment for defendant, and plaintiff appeals. Affirmed.

Styles & Koffel, for appellant. John Carmody, for respondent.

MORGAN, C. J. Action on a promissory note by an indorsee claiming to be a purchaser in due course. The answer alleges that the note was procured through fraudulent representations on the part of the payee, and that the plaintiff took said note with knowledge of the fraud by which it was executed and delivered. The jury found in favor of the defendant. A motion for a new trial was made and denied. Plaintiff appeals from the order denying a new trial. The assignments are numerous; but the one principally relied on is that the evidence is insufficient to justify the verdict.

The original payee of the note was one Dr. Rea, of Minneapolis, who traveled as a specialist in curing various diseases. The defendant consulted him at Moorhead, Minn., and was informed that he was inflicted with a cancer, and the doctor agreed to cure him for $250. The defendant had only $25 in money, but gave his note for $250, and paid him $25 in cash, which was immediately indorsed as a payment on the note. The doctor then treated him by injecting some preparation into the alleged cancerous growth, and agreed to send him some more medicine by express. In a very few days the medicine came by express, but the defendant refused to accept it for the reason that it had been consigned C. O. D., and required a payment of $101.50 be-

Digitized by Google

fore the express company could deliver it to him. The defendant then consulted a local physician, who cured him in about one week. These are the facts as related by the defendant, and must have been found to be true by the jury in view of the verdict in his favor. Accepting the same as true, we think that the allegation of fraud in the inception of the note was sustained. The promise to cure the defendant must have been made without any intention of performing it. Under our statute the making of such a promise constitutes fraud. Section 5293, Rev. Codes 1905; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081.

The evidence also amply sustains the fact that the doctor was not acting in good faith in his representations. He did not send the medicines in accordance with his agreement, but sent them by express with intent to force a payment of $100 not due before the medicine could be used. He sold the note very soon after the refusal to pay the $100 to the plaintiff. Whether the plaintiff is an indorsee in due course is a question in dispute between the parties. The plaintiff claims that the note duly indorsed was delivered to him on June 6th, and that he thereafter paid $202.50 therefor, having purchased on a 10 per cent. discount. He does not claim to have paid for it on that day, and first says that he does not known the day when he paid for it. He states that he paid for it later, when he made a "settlement" with the doctor for some other notes. The evidence shows that the plaintiff was accustomed to buy notes from the doctor regularly, and had been accustomed to do so for three years, and that he had some trouble in collecting some of them because the parties "did not want to pay them." He does not specifically remember the reasons why the makers refused to pay the notes, but knows that he has a considerable number of these notes now on hand, past due and uncollected. He made no inquiry concerning the financial responsibility of the defendant before purchasing the note, unless from the doctor. The defendant was a stranger to him. He immediately placed the note in the hands of an agency for collection, although it was not yet due. He knew that the doctor was accustomed to travel throughout the country in his professional capacity, and took notes in payment of services performed. He says further: "I did not know of any dispute or defense of the note at the time I purchased it. I did not inquire." He nowhere states that he bought the note in good faith. He does not state that he had no notice of defenses at the time he paid for the note. It will be noted that it was bought and delivered to him on June 6th. He claims that he paid for it later when a "settlement" was made for this note and others. On this question he testifies: "Q. At the time that you bought this note in suit from Dr. Rea, did you buy any others from him? A. I don't remember. Q. But at the time you settled with him for this note you settled for several others at the same time, did you? A. Very likely so. Q. Do you remember when you paid for the note? A. I do not." On redirect-examination, in response to leading questions, he says that he is positive that the "settlement" was made prior to July 15th, which would be about three weeks before the note became due. Dr. Rea was also a witness, and on the question of the negotiation of the note testified simply that the "note was sold before maturity on June 6th." Nothing was stated by him about the time of payment nor how paid.

Digitized by Google

On this testimony we are urged to declare that the verdict is not sustained by the evidence, and that it is uncontradicted that the plaintiff was an innocent purchaser. After carefully reading all of the testimony of the plaintiff, we find it evasive, contradictory, and of an unsatisfactory character to prove facts entirely within the knowledge of himself and Dr. Rea. There is not even an attempt to show that there was no notice of defenses on the day that he claims to have paid for the note. If he then had notice of defenses to the note, he would not be an innocent purchaser. Joyce on Defenses to Commercial Paper, § 240.

The plaintiff's contention, therefore, is that he is a bona fide holder by virtue of purchase and payment before day of maturity. Payment of value on a purchase before maturity is prima facie evidence that the purchase is in due course. Bank v. Flath, 10 N. D. 281, 86 N. W. 864. We think that the record shows sufficient to sustain the verdict that plaintiff did not purchase in good faith. Conceding that payment was made before maturity, we are convinced that the jury had sufficient facts before them to warrant the inference therefrom that plaintiff did not buy the note in good faith as contemplated by the statute and the law merchant. A purchase in due course means a purchase before maturity for value and in good faith. Plaintiff had handled Dr. Rea's notes before as an employee of a collection firm, and had purchased a large number of his notes before. Many of these notes were still uncollected and past due. As to some of these notes payment had been refused. He immediately placed the notes in other hands for collection after their purchase. He had no knowledge, and is not certain whether he made any inquiry, as to the financial responsibility of the maker. He and Dr. Rea were well acquainted and intimate in business relations. Litigation had grown out of some of these purchases of notes from Dr. Rea. In Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550, Judge Corliss said: "It may be true in this case that the plaintiff bought before maturity for value, and without notice of any defense; and yet he may not be a purchaser in good faith. He may, when he bought, have had knowledge of facts which excited in his mind such suspicions as to the paper that he feared to make an investigation lest it would disclose a defense, and therefore he carefully shut his eyes and bought in the dark. In such a case he would not be a purchaser in good faith" — citing cases. "In this case the plaintiff is careful not to state that he bought in good faith, nor does he offer any explanation of the circumstances surrounding the purchase. . . . The plaintiff, having the burden of proof, has failed to sustain it by positive evidence. The inference of his good faith to be drawn from the other facts sworn to by him is by no means strong, and the case discloses several circumstances which cast grave doubt upon the fact of his good faith in the transaction." In the case at bar we find the same circumstances practically as in that case and others that tend to show bad faith in not making inquiry concerning the title to the note in question. The evidence of want of notice of defective title at the time the money is claimed to have been paid is very unsatisfactory.

Plaintiff had notice through the answer that fraud in the inception of the note was claimed, and there is no reason why positive proof should not have been produced as to the time of payment. We do

Digitized by Google

not wish to intimate that good may not be shown in some cases by inferences from shown facts. But failure to state that the purchase was in good faith is a strong circumstance in this case to negative good faith. The plaintiff also had positive knowledge of the fact that payment was refused on many of Dr. Rea's notes. It savors of a purpose to avoid inquiry amounting in law to bad faith. The rule is stated by Joyce on Defenses to Commercial Paper as follows in section 475: "But, if the acts of the holder of the paper in obtaining the paper constitute bad faith, he will not be entitled to protection as a bona fide holder. It may, therefore, be stated as a rule that suspicious circumstances alone, even though sufficient to put an ordinarily prudent person on inquiry, will not, in the absence of bad faith or a wilful disregard of the facts showing an infirmity of the paper, destroy the title of a taker of negotiable paper as that of a bona fide holder." See, also, Bank v. Flath, 10 N. D. 281, 86 N. W. 864; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; Mass. Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Robbins v. Swinburne Print. Co., 91 Minn. 491, 98 N. W. 331, 867; Second Nat. Bank v. Morgan, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652; Smith v. Livingston, 111 Mass. 342; Goetting v. Day, (Sup.) 87 N. Y. Supp. 510; Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081. The circumstances shown by the record, taken altogether, are sufficient to overcome the prima facie presumption of good faith raised by proof of purchase for value before maturity if it was paid before maturity. It is well settled in this State that, when it is shown that there was fraud in the inception of a note, the burden rests upon the purchaser to establish that he purchased the same in due course and in good faith. Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550; Bank v. Flath, 10 N. D. 281, 86 N. W. 867.

The deposition of Dr. D. E. Rogers was read at the trial. Objection was made thereto on the ground that the notice to take the deposition gave the name of the witness as D. E. Rogers. The deposition was subscribed by "Daniel Eastman Rogers," and he was not referred to in the deposition or certificate as "D. E. Rogers." The officer who took the deposition indorsed on the envelope that the same contained the deposition of Dr. D. E. Rogers, and gave the title of the action in which it was to be used. Where the notice gives the name of the witness by initials, and a witness appears at the time and place designated, and gives material testimony in the action, we do not think that the fact that he subscribes the same by his full Christian names, the first letters thereof being the same as the initials given in the notice, that extrinsic evidence is required to show that the witness testifying is the same person as the witness named in the notice. The indorsement on the envelope, however, would be sufficient to identify the party if additional identification were necessary.

Objection was made at the trial to the giving of any evidence on the part of the defendant, for the alleged reason that the answer did not state facts sufficient to constitute a defense. The point is that the facts consituting the fraud and fraudulent representations are not sufficiently alleged. We think the allegations are sufficiently full and specific, as against an objection made at the trial. Much more liberality is permitted in construing allegations of complaints or an-

Digitized by Google

swers when made at the trial than when attacked on demurrer. Waldner v. State Bank of Bowden, 13 N. D. 604, 102 N. W. 169. Plaintiff filed objections to the deposition of Dr. Rogers, and asked to have it suppressed. The written objections were handed to the clerk after the court had directed him to call a jury, but before the name of any juror was called. The court refused to hear the objections on the express ground that the objections had not been filed "before the commencement of the trial." The statute requires objections to depositions on grounds other than those relating to irrelevancy or incompetency to be filed before the commencement of the trial (section 7288, Rev. Codes 1905), "and the court shall on motion of either party hear and decide questions on exceptions to depositions before the commencement of the trial" (section 7289, Rev. Codes 1905). The time when a trial commences may be at a different stage as to one question than as to another question. No general rule can be laid down that will govern as to all questions. As to some questions, the courts have held that the trial does not commence until the jury is impaneled and sworn. Hunnell v. State, 86 Ind. 431. We think the construction given this statute by the trial court a reasonable one. The object of providing for filing such objections before the trial commences is to enable the party to secure another deposition if the one on file is suppressed. It also serves to expedite court proceedings. No harm can follow a strict enforcement of the rule announced by the trial court, and it is certainly proper to dispose of such preliminary questions before any time is taken up in securing a jury. This rule has the sanction of authority. Weeks on Depositions, §§ 365-378; Hill v. Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Ueland v. Dealy, 11 N. D. 530, 89 N. W. 325.

Objections were also made to certain evidence contained in Dr. Rogers' deposition. He was qualified to give expert testimony, shown by the fact that he was a graduate of the Harvard Medical School and had practiced medicine since 1900. He treated the defendant for the trouble with which he was suffering, and it was competent for him to state from his personal examination and treatment that he saw no appearances or signs of a cancerous growth. Rogers on Ex. Ev., § 50. This question was objected to: "What, if any, symptoms of cancerous growth did you find there?" The objection is based upon the fact that the witness did not describe or state all the matters that he saw when he examined the defendant about two years after a cure had been effected, and that his conclusions were therefore inadmissible as too remote and the evidence not showing all the facts on which the opinion was based. We think sufficient facts were shown in his testimony upon which an opinion was properly given. The objection as to the remoteness in time of the examination went to the weight of the evidence, and not to its competency. This question was also objected to when asked of the same witness: "You read the testimony of Dr. Rea, and you heard the testimony of Dr. Rogers read, you heard the testimony of Mr. Rock in regard to the condition of his lip. Now, from the testimony of Dr. Rea, Dr. Rogers and Mr. Rock, state whether or not in your opinion Mr. Rock was suffering from a cancerous growth on his upper lip at the time he was treated by Dr. Rea in May, 1904." The objection to this question was that it called upon the witness to pass upon the credibility of the witnesses

Digitized by Google

in case of conflict. On examination of the evidence given by these witnesses, we find no conflict as to the facts stated by them. The conclusion or opinion of Dr. Rea as to what defendant was suffering from differed from that of the other medical witnesses, but as to the facts and conditions of the ailment there was no difference. For this reason, the evidence was not objectionable, and did not call upon the witness to decide facts properly for the jury. The form of the question is not to be commended. It is the safer practice to incorporate all the facts relied on in a hypothetical question. It then becomes easy to determine what facts the opinion is based on. One of the medical experts testified that his opinion was based partly on what the defendant had told him as to the symptoms of the ailment. This was objected to. A physician may give his opinion based on such statements in connection with an examination. In Barber v. Merriam, 11 Allen (Mass.) 322, it was said: "The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into and form a part of the facts on which the opinion of an expert as to the condition of health or disease is founded." Rogers on Ex. Ev., § 47; Quaife v. C. & N. W. Ry. Co., 48 Wis. 513, 4 N. W. 658, 33 Am. Rep. 821; Jones v. Chicago, St. P., M. & O. Ry., 43 Minn. 279, 45 N. W. 444.

There are other assignments of error mentioned in the brief, but they are so closely related to those already disposed of that further statement of them would be without any benefit. We have carefully considered them in detail and find them devoid of merit.

The order appealed from is affirmed. All concur.

Checks: Presentation of Check: Negligence in Presentation.

Thomas L. Carroll drew a check in favor of an agent of the Union Pacific Railroad Company upon the People's State Bank of Gothenburg. This check was transferred to the State Bank of Gothenburg, but before the State Bank of Gothenburg could present the check for payment to the People's State Bank of Gothenburg, the People's State Bank of Gothenburg closed its doors. The State Bank of Gothenburg passed into the hands of a receiver, one H. V. Temple, who brought a suit against the payee, Union Pacific Railroad Company, and the maker, Thomas L. Carroll, to recover upon this check. The State Bank of Gothenburg was substituted as the plaintiff in the action in the place of H. V. Temple, the receiver for the State Bank of Gothenburg. The defendant Carroll pleaded that he had sufficient funds in the bank, at the time the check was drawn, to pay it and that by reason of the negligence of the plaintiff in failing to present the check for payment, until after the bank upon which it was drawn had suspended payment, he was relieved from any liability upon the check. The railroad company set up practically the same defense as the drawer of the check. The court held that the circumstances

Digitized by Google

showed that the plaintiff was not negligent in presenting the check for payment, but that the plaintiff used due diligence. Judgment was rendered for the plaintiff, and the defendants appealed, and the judgment was affirmed.

The court said in part:

"The evidence discloses that on the afternoon of the 27th day of May, 1901, the Union Pacific Railroad Company received the check in controversy in payment of a freight bill. Through its agent the check was indorsed and transferred to the plaintiff after banking hours on that day, and the agent received Omaha exchange in payment of the check. The usual banking hours in Gothenburg were from 9 A. M. to 4 P. M. The evidence also tends to show that the banks sometimes opened a little earlier and kept open a little later, at least for the transaction of some lines of business. On the following morning Carlson, the president of the State Bank, before banking hours, learned that the State bank examiner was in Gothenburg, and he had some reason to believe that the People's State Bank might be in financial difficulties. Shortly after 8 o'clock Carlson went to his own bank and about 8:30 took the check in question and went to the People's Bank to present it for payment. The bank was not then open. He then went to a barber shop, and later returned to the People's Bank to present the check. He claims that it was about 9 o'clock when he returned. The evidence of defendant tends to show that it was about 10 o'clock. At this time payment of the check was refused, and Carlson was informed that the bank was under the control of the State bank examiner. Carlson did not return to his own bank from the time he left it at about 8:30 until after he had been refused payment of the check. During Carlson's absence from his bank an employee of the People's Bank, under the direction of the State bank examiner, took certain checks held by that bank and drawn upon Carlson's bank to the latter bank, and received the money thereon. At the same time he made inquiry as to whether the State Bank held any checks drawn against the People's Bank. The employee at the State Bank, not having any knowledge of the check in the hands of its president, informed the representative of the People's Bank that it had no checks against it. The evidence shows that it was the usual custom of the banks to "clear" each day between the hours of 3 and 4 in the afternoon. The appellants contend that, if the president of the plaintiff bank had left this check to the State Bank it would have been paid by the representative of the People's Bank when the checks were presented by him for clearing, or that, if the president had notified the other employees of the State Bank that he had the check, it would have been paid by the People's Bank out of funds then in its possession. Under this state of affairs, the appellants claim that appellee was negligent, and that by reason of its negligence the check was not paid, and therefore they should be relieved of any liability. Carroll at the time had a much larger sum on deposit in the People's Bank than the amount of his check. It is conceded that the check has not been paid, and the appellants are liable thereon, unless they are relieved by some act of negligence on the part of the plaintiff. Let us analyze the evidence and see whether any negligence exists. In the first place, the check could not have

Digitized by Google

been presented on the 27th day of May, because it was not received until after banking hours. It being the usual custom of the banks to clear between 3 and 4 o'clock in the afternoon, plaintiff could not anticipate, and had no reason to anticipate, that any representative of the People's Bank would attempt to clear with it in the early afternoon. Under these circumstances it could not to our minds be considered an act of negligence on the part of the plaintiff for its president to take the check out of the bank. It does appear that he was using due diligence to present the check promptly to the People's Bank, and that he was there knocking at the door before the usual time of opening. According to his testimony, he was there at the usual time for opening and gained admission, but did not obtain payment. But, taking the evidence most unfavorable to the plaintiff, he did present the check as early as 10 o'clock, and was refused payment. Under these circumstances we think the evidence would not sustain any charge of negligence. But, beyond this, the rule of law is well recognized that, to predicate a right of recovery or defense upon the negligence of another, such negligence must be the proximate cause of the injury. The evidence in this case does not show that if the check had been in the plaintiff bank when the representative of the People's Bank presented checks against it, it would have been paid. We think the inference is to the contrary, because the evidence shows that the employee of the People's Bank went to the plaintiff bank pursuant to the directions of the bank examiner, who was then in charge of the People's State Bank. He was collecting the assets that belonged to the People's Bank. He certainly had no authority, and no right to pay out the funds of the bank after he had taken charge. He would have no right to prefer one creditor over another, and we cannot assume that he would have done so. Again, the evidence does not show that the People's Bank was ever open for business or ever paid a check or demand upon it after the time the check came into the possession of the plaintiff. Under these circumstances, even if it should be conceded that the plaintiff was negligent, the appellants in this case were not in anywise injured thereby. Under this evidence, we think that only one verdict could have been properly rendered, and that was in favor of the plaintiff in the action. The evidence is not only sufficient to sustain the verdict, but is such as to preclude any other verdict. In this view of the case it is unnecessary to consider any instructions that may have been given. Whether erroneous or not, they were not prejudicial. It follows that the judgment of the District Court should be affirmed."

See Decision No. 1092.

Bills and Notes: Bona Fide Holder: Fraud.

One McKinnon was the holder of two promissory notes, one executed by John A. Reilly and the other by Joseph Rynkievicz. The notes were executed to the International Mercantile Agency, and the consideration was stock in that company, which the makers purchased through an agent of the president of the company. The company

Digitized by Google

pledged these notes for a loan of $30,000 made to it by the plaintiff, the holder of the notes, the said McKinnon. McKinnon was a director of the corporation. It was proved at the trial that there were misrepresentations made as to the value of the stock which the makers of the notes purchased. The one representation which particularly misled the defendants was to the effect that the corporation had $500,000 in the treasury, whereas the corporation was in a very weak condition and sadly in need of funds. The stock was sold by McCauley, the president of the corporation, upon a commission of three-quarters of the net proceeds of the sale in excess of $50 per share, and the stock was sold to the defendants for $125 per share. The defendants set up the lack of consideration as defense to the notes and contended that McKinnon was not an innocent holder for value for the reason that he was one of the directors of the company and a member of the executive committee which placed the matter of the sale of the stock in the hands of McCauley. Judgment was rendered for the plaintiff and the defendants appealed. The judgment was affirmed. The Circuit Court of Appeals held that the test was whether or not the holder was a holder in good faith. In other words, the knowledge on the part of the holder of facts which would put an ordinary man on inquiry was not so important a feature as the test of good or bad faith. The bad faith of the holder of the note would have to be proved in order to defeat his recovery. We think that the universal opinion of the highest courts would be that although bad faith on the part of the holder may be the test, the knowledge of facts which would indicate a defective inception of the note can be taken as evidence of the bad faith.

The court said in part:

"The corporation was organized to carry on a commercial agency of a character somewhat similar to those of Dunn and Bradstreet, and its first issue of stock was made to McCauley for the transfer of the assets and good will of other similar corporations, which, however, for the most part, had proved to be failures; such an enterprise was necessarily to some extent speculative, and of such a character that to insure its success considerable capital would naturally have to be advanced without any immediate prospect of remunerative return. At all events, the evidence does not conclusively show that the corporation was organized as a fraudulent concern, or for the purpose merely of making money by the sale of its stock. So far as appears, it may have been honestly conceived, and under proper management might have had a reasonably prosperous career. Indeed, only a few months before its failure, a committee of the directors was appointed for the special purpose of investigating its affairs, which having been done, the committee made a flattering report of its prospects, which was communicated to the plaintiff, in common with the other stockholders of the company. But, as already stated, whatever the character of the company may have been, there is no evidence of a fraudu-

Digitized by Google

lent conspiracy or any evidence to show that the plaintiff took the notes in question with knowledge of the alleged fraudulent representations, or with such notice of the facts and circumstances attending their execution that his acceptance of them must be deemed to have been done in actual bad faith. He was ignorant of the entire transaction. One may be a bona fide holder of commercial paper and entitled to protection as such, notwithstanding he had knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even though he were grossly negligent at the time of the transfer; the test is, did he act in bad faith? This is generally accepted law, and might be supported by a multitude of cases, reference, however, will be made to a few only. In Murray v. Ladner, 2 Wall. 110, at page 121, 17 L. Ed. 857, the Supreme Court says: 'Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.' And again in Hotchkiss v. National Bank, 21 Wall. 354, 22 L. Ed. 645, the same court, at page 359 (22 L. Ed. 645), lays down the rule in the following language: 'The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of defect in title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or wilful ignorance, and the burden of proof lies on the assailant of the title.' In Clark v. Evans et al., 66 Fed. 263, 13 C. C. A. 433, the Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the court below because the trial judge charged the jury that 'if you further believe that the plaintiff . . . had knowledge of such facts as would put a prudent man on inquiry, and that inquiry, if prosecuted, would have led to a knowledge of the fraud, then you will find for the defendant.' In its opinion the Court of Appeals said: 'The charge was erroneous. Knowledge of such facts as would put a prudent man on inquiry would not affect the right of the plaintiff to recover if she was otherwise a bona fide holder for value. One who purchases a negotiable note for value before maturity does not owe the maker the duty of making active inquiry into the origin or consideration of the note, before purchasing the same. His right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper. Knowledge of such facts as would put a prudent man on inquiry will not suffice.' In Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934, a charge to a jury very similar to the above was held to be erroneous, and the judgment below reversed on that ground. King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84, and Battles et al. v. Laudenslager, 84 Pa. 446, are illuminative of the case at bar, as well as of the point under consideration. We think the trial judge was entirely warranted in directing, as he did, verdicts in favor of the plaintiff. Any other course would have been unwarranted."

See Decision No. 1093.

Digitized by Google

Partnership: Mining Partnerships: Community of Interest in Profits.

Partners are personally liable to the full extent of all the property which they personally possess for the debts of the partnership. What elements constitute partnership have frequently been the subject of judicial determination. These suits have ordinarily been the result of a partnership creditor attempting to hold one of the partners liable for a partnership debt, in a case where the partner did not consider that he was a partner and liable as such. In the case under consideration, a man by the name of Bentley sued Brossard and others, alleging that the said Brossard and others had formed a partnership for the development of certain mining claims; that he had performed certain services as engineer for them and had not been paid. The element which the courts hold determines whether or not individuals engaged in a common business are partners is the sharing of profits. If all of the individuals engaged in a common enterprise have a community of interest in the profits, they are partners, and as such are liable individually for the losses of the partnership. It does not make any difference that they may have agreed among themselves not to share the losses, if they have as a matter of fact stipulated in effect that they are to share the profits as profits, they are held to be partners. In a mining partnership there is not the so-called choice of partners, delectus personæ, which is an element of the ordinary trading partnership. For instance, in a trading partnership a partner cannot assign his interest to another individual without the consent of his partners, whereas in a mining partnership he may do so. The powers of the members of a mining partnership are limited to the performance of such things as may be necessary to the transaction of the mining business, but a mining partner may bind his co-partner in such transactions as are necessary in the mining business. A mining partnership may exist, though all of the partners may not have a personal interest in the property, if they have an interest in the working of the property. The element of agency in a partnership is the result of the partnership. The partnership is not the result of the agency. In other words, if two men are partners, one is the agent for the other in the affairs of the partnership, and if they are not partners, one is not an agent for the other, unless agency has been created by some other method.

The court said in part:

"We are of the opinion that the court erred in charging the jury that the written contract of the defendants did not constitute the relation of partnership. It is not essential to inquire into the requisites of a general or trading partnership beyond the principles of law which are in common with such a partnership and a mining partnership. As to the general principles involved, and particularly applicable to the case, we find no better statement of the rule than that of Mr.

Digitized by Google

Justice Gray in the case of Meehan v Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, as follows: 'The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits.' After reviewing the authorities it was further observed by him: 'In the present state of law upon this subject it may perhaps be doubted whether any more precise general rule can be laid down than as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each received part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business, and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.' It is sometimes said that an obligation to share losses is an essential element to the existence of a partnership. While an obligation to share losses is not directly expressed in the agreement, still it has been quite generally held that an agreement to share profits, nothing being said about losses, amounts prima facie to an agreement to share losses also. 1 Lindl. on Partn. (Ewell ed.) 30.

"The contract executed by the defendants recites: 'That whereas the first party (Brossard) has leased from L. Fannof mining claims (naming them); and whereas it is deemed advisable and agreed by the parties hereto that the sum of $5,000 shall be furnished for the development of said mining claims and the carrying out of the said contract when completed by the first party therein and the said L. Fannof for the development of the said mining claims, and for earning and securing the option in said contract set forth: Now, therefore, it is hereby agreed by the parties hereto, etc.' It is thus seen that the lease between Brossard and Fannof was not only the inducement for the making of the contract between the defendants, but was the very subject-matter of their agreement, and, by sufficient reference, was in effect made a part thereof. To therefore arrive at a correct meaning of the defendants' contract, and to properly understand it, it must be read in connection with the lease. The object of entering into their contract was to work and develop the group of mines in accordance with the terms of the lease, and for the purpose of obtaining whatever benefits and advantages that might be derived therefrom. Such was the adventure undertaken by them and the purpose for which they associated themselves together. Their undertaking to develop and work the property was not for the benefit of Brossard alone, but was for the common benefit of all the parties to the contract. They, then, agreed as to the amounts of money that should be contributed by each. Each party was to receive a pro rata share of the moneys derived from the sale of ores over and above the

Digitized by Google

expenses of operation, and in proportion to the amount contributed by each; and likewise each was to share in like proportion to an interest in and to the property itself in the event of a successful operation and of earning and securing the option provided for in the lease. They, therefore, had a community of interest in whatever profits that were to be obtained. We thus have every requisite of a partnership, and a case where the parties in clear and unambiguous terms have, in the language of Mr. Justice Gray, joined together on an adventure, for their common benefit, each contributing money and having a community of interest in the profits. When the writings are read, how can it be said that these defendants did not join together upon an adventure to work and develop the group of mines mentioned in the lease and under the terms and conditions as therein specified? That such joining together was not for their common benefit? That the contributions made were not for the purpose of working and developing claims, of obtaining whatever ores that might be found from the explorations, of acquiring an interest in the property, if found valuable, and were it not in favorance of the very objects for which the parties associated themselves together? That they did not have a community of interest in whatever profits to be derived from the adventure? The terms of these contracts were precise and explicit. The language was clear and unequivocal. There was nothing doubtful or ambiguous about them which required explanation by resorting to extraneous circumstances. The court ought to have held that the agreement of the defendants created the relation of partnership. When the trial court permitted the jury to determine from all the evidence and circumstances whether the defendants had intended to assume the relation of partnership towards each other, it also committed error. True it is sometimes said that to constitute a partnership the parties must have intended to create such relation. 'But,' as was said by the court in the case of Fleming v. Lay, 109 Fed. 952, 48 C. C. A. 748, 'by this it is meant to say that they must have intended to make such stipulations as in law constitute a partnership, and not that they intended the conclusion without regard to the conditions upon which it results as matter of law.' And, as said by Mr. Lindley in his work on partnership, 'if they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agrement.' 1 Lindl. Partn. (5th ed.) 11. In 27 Cyc. 755, it is said: 'A mining partnership arises when two or more co-owners of mining claim actually engage in working the same, and share, according to the interest of each, in the profit and loss, although there is no express agreement between them to become partners, or to share the profits and losses. Such a partnership is not restricted, however, solely to the cases where the mine is owned by the parties working it, if they have an interest in working it or in carrying on mining operations. It can be formed either to prospect for and locate mines, or to work mines belonging to other persons, or to any or all of the individual members.' In speaking of mining partnerships, Mr. Lindley, in his work on Mines (volume 2, § 798), says: 'Such a partnership may exist as well where the parties have an interest in the working of the mine in carrying on mining operations as where they own the mine itself.' In 2 Snyder on Mines, § 501 et seq., is found a full discussion of

Digitized by Google

what constitutes a mining partnership, the distinction between such a partnership and a co-tenancy, or an ordinary trading or general partnership. See, also, notes to the case of G. V. B. Min. Co. v. Bank, 95 Fed. 35, 35 C. C. A. 515. In the case of Manville v. Parks, 7 Colo. 128, 2 Pac. 212, the question was directly before the court. It was there said: 'It is evident that a mining partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own the mine itself.' To the same effect are the following cases: Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Hartney v. Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005; Ashenfelter v. Williams, 7 Colo. App. 332, 43 Pac. 664; Settembre v. Putman, 30 Cal. 490; Dunlap v. Pattison, 4 Idaho, 473, 42 Pac. 504, 95 Am. St. Rep. 140; Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. 318; Haskins v. Curran, 4 Idaho, 573, 43 Pac. 559. The facts in the case of Meagher v. Reed, supra, are very similar to the facts of the case in hand. There Meagher obtained a lease from the owners of the claims in his own name. The property was worked under the lease and developed by himself and his associates, who had no interest whatever in the properties, except as they had an interest in the lease through an agreement with Meagher, and because thereof were interested in the working of the mine and the profits to be derived therefrom, and were to acquire undivided interest therein in case of successful development and operations. True, Meagher had agreed to assign an undivided interest to his associates in and to the lease when obtained from the owners, while here there was no such express agreement on the part of Brossard, but where nevertheless his contract with his associates operated as an equitable assignment of an interest in the lease and gave them an equitable interest therein. At any rate, by Brossard in his contract with his associates agreeing to convey to them specified undivided interests in and to the mining property itself acquired in pursuance of the lease, and so to pay them pro rata shares of the proceeds of ores over and above expenses, gave them an interest in and to the claims and the business quite as much as though he had merely agreed to assign to them an interest in the lease, and certainly gave them an interest in the working of the properties and in carrying on the mining operations. From the foregoing authorities it will thus be seen that the rule is well established that a mining partnership may exist between persons, although all of them may not have a direct or present interest in and to the properties themselves, if they have an interest in the working of the property or in carrying on the mining operations. It is not even essential that there should be an express agreement to become partners, or an express stipulation to share profits and losses, as that is an incident to the prosecution of the general business. Duryea v. Burt, 28 Cal. 569; 2 Lindl. on Mines, § 797. Again, referring to the contract of defendants, it seems quite clear that they associated themselves together to work and develop the group of mines in question for their common benefit; that each have an interest in and to the lease, and in working and developing the properties, and in carrying on the mining operation; and that each had a community interest in whatever profits that were to be derived from such operations. The agreement, under all the authorities, contains every requisite of a

Digitized by Google

mining partnership. Quite true, a distinction is made, and is well recognized by the cases and the text writers, between such a partnership and an ordinary trading or general partnership. The principal distinctions are that a member of a mining partnership may assign his interest without the consent of his co-partners, and the act does not work a dissolution of the partnership; that the person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other parties consent thereto. Neither does the death of a member dissolve the partnership. Another distinction is that a member of a mining partnership has not the power to bind his associates by engagement with third persons to the extent that a member of a trading or commercial firm may do. For instance, the law does not imply any authority to a member of a mining partnership to borrow money, to employ counsel, to execute a promissory note, or to draw or accept bills of exchange, no matter how pressing the necessity for the use of the money. The reason assigned for the distinction, and for limiting the powers of members of a mining partnership, is that such a partnership is not founded on the delectus personæ, whereas other partnerships are. For these reasons it is held that the powers of members or managers of mining partnerships are limited to the performance of such acts in the name of the partnership as may be necessary to the transaction of its business, or which are usual in like concerns. But a partner can bind the firm by acts in the name of the partnership in such matters as may be necessary to the transaction of the business, or which are usual in like concerns, unless there is an express agreement to the contrary known to the party contracting with the firm. Except as to these distinctions, the law governing a mining partnership is not different from that applicable to ordinary commercial or trading partnerships. 2 Snyder on Mines, § 1526; 27 Cyc. 557–559; Skillman v. Lachman, 23 Cal. 199, 83 Am. Dec. 96; Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266; Manville v. Parks, supra; Meagher v. Reed, supra; Charles v. Eshleman, 5 Colo. 107. The employment of the plaintiff by Brossard to do labor on the property was necessary to the transaction of the business and was usual in like concerns, and was therefore within the implied powers of Brossard, and was binding on the other members of the firm. In that regard it may here be said, as was said by the court in Manville v. Parks, supra: 'In this case the articles purchased of the plaintiff were essential to the carrying on of the business and the accomplishment of the purpose of defendants in working the mine, and the debt being created in the necessary and usual course of the business, and within the scope of the partnership adventure, the individual member who made the purchase had lawful authority to contract the debt, and to bind his co-partners thereby.' And it must here be held, as was held in the case of Lyman v. Schartz, 13 Colo. App. 318, 57 Pac. 735, that one member of a mining partnership has authority to employ laborers to work the mine and to bind the partnership for their wages. It is also said by counsel that Brossard had the active management of the properties; that he employed the labor and purchased the material, directed and controlled all the work and operations at the mines, and that the respondents had not given him any authority or direction with regard to such matters. From this it is argued that the re-

Digitized by Google

spondents were not principals in the business; that the relations of agency did not exist between them and Brossard, and therefore no partnership relation existed between them. As pointed out in the cases of Pooley v. Driver, 5 Ch. Div. 458, and Meehan v. Valentine, supra, the reference to agency as a test of partnership, as made in some of the cases, 'was unfortunate, inasmuch as agency results from partnership, rather than partnership from agency.' Says Mr. Justice Gray: 'Such a test seems to give a synonym rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn.' The proving of agency, as must be readily conceded, does not prove a partnership. But from the proof of partnership agency at once results. It is a sort of agency of one person acting on behalf of the firm. 'He does not act as agent, in the ordinary sense of the word, for the others, so as to bind the others. He acts on behalf of the firm, of which they are members, and as he binds the firm, and acts on the part of the firm, he is properly treated as the agent of the firm.' Pooley v. Driver, supra. Nor is the fact that Brossard had charge of the work and employed the labor and purchased the material significant or controlling under the circumstances of the case in determining whether the mining operations carried on were his individual business or the joint business of himself and associates, for such delegation of power to a general manager or common agent is not an infrequent incident of business of partnership. That the working of the mine was not his individual business, and the carrying on of the mining operations was not alone for his benefit, but for the common benefit of all the parties to the contract, is conclusively shown by all the evidence."

See Decision No. 1094.

INDIANA FUEL SUPPLY CO. v. INDIANAPOLIS BASKET CO.

(Appellate Court of Indiana. May 14, 1908.)

84 N. E. 776.

SALES — CONTRACT — MEETING OF MINDS AS TO SUBJECT-MATTER — NECESSITY FOR — CONSTRUCTION — PROVINCE OF COURT — CONTRACTS — IDENTITY OF SUBJECT-MATTER — APPEAL — HARMLESS ERROR — ERRORS NOT AFFECTING RESULT.

1. Mutual assent is an essential to every contract, and any mistake of the parties by which they have different things in mind as the subject-matter, and where the terms of the contract are such that it will mean either thing, there is no meeting of the minds of the parties, and, if a contract for the delivery of "Indiana egg coal" would properly describe two grades, and the buyer had in mind the higher grade and the seller the lower grade, and each party believed that he was contracting for the kind of coal he had in mind, no contract was made.

2. Where a contract for the sale of coal was silent as to whether steam or domestic coal should be furnished, domestic coal being the higher grade, that the coal was

Digitized by Google

bought and sold for the purpose of generating steam does not show conclusively that the higher grade was not contemplated by the contract.

3. In an action involving a contract, its construction is for the court, and not the jury.

4. Where defendant's agent on being solicited for a coal order, and being asked by plaintiff's salesman what he would pay, stated he had been buying "Indiana egg, double screened coal, absolutely clean, for $1.75," and, after a telephone conversation with plaintiff's office, the salesman stated to defendant's agent "We will put it in here for $1.75," an order given for "Indiana egg coal" pursuant to such negotiations requires defendant to furnish double screened coal.

5. It appearing in an action for the price of coal which defendant buyer refused to receive, and which was sold by the carrier for freight and demurrage charges, that plaintiff, seller, was not entitled to recover because it did not furnish the grade contracted for, any mistakes of the trial court in admitting or rejecting evidence or in instructing are not reversible error.

Appeal from Circuit Court, Marion County; Henry C. Allen, Judge.

Action by the Indiana Fuel Supply Company against the Indianapolis Basket Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Jamison, Joss & Hay, for appellant. Charles Remster, for appellee.

RABB, J. On the 19th day of December, 1904, the appellee, through its president, gave the appellant a written order for two cars of Indiana egg coal, to be delivered f. o. b. cars on appellee's switch at Indianapolis after January 1, 1905, at the price of $1.75 per ton, which order was accepted in writing by the appellant. Neither the order nor its acceptance contained any more definite description of the coal which was the subject of the contract than "Indiana egg." The evidence shows that what is known to the trade as "egg" coal is coal run over screens with a three-inch mesh, and another screen with a one and one-quarter inch mesh. The coal passing through the three-inch screen and over the one and one-quarter inch screen is known as "egg" coal. The evidence also shows without controversy that there are two grades of "egg" coal, the higher grade being made by running the coal over the screens twice, the lower grade by running the coal over the screens but once; there being more slack in the lower grade than in the higher grade, and the higher grade being more expensive. The lower grade is known to the trade as "steam egg" coal, and the higher grade as "domestic egg" coal. One car load of the coal furnished by appellant under its contract arrived on appellee's switch some time in January, in the absence of appellee's president, and was unloaded by appellee's servants at its place of business without inspection. Appellee at once gave the appellant notice that it claimed the coal did not comply with the contract, and that it would not receive and pay for the same. After some discussion of the matter, the appellee, however, did pay for the car load of coal received, but cleaimed that it was not in compliance with the contract, and that it would not receive and pay for the second car. It is contended by appellee that it was agreed by appellant that appellant would divert the second car to some other place, and not call upon the appellee to accept or pay

Digitized by Google

for the same. This, however, is disputed by appellant. The second car arrived on appellee's switch on the 22d day of January, 1905. Appellee refused to receive and unload the same, and the coal was afterwards sold by the railroad company for the payment of freight and demurrage. This action was brought by appellant before a magistrate to recover the contract price of the coal, the appellee contending as a defense, among other things (1) that because of a misunderstanding between the buyer and the seller as to the grade of coal the contract called for, the buyer having in mind Indiana domestic egg coal, double screened, and the seller having in mind Indiana steam egg coal, screened but once, that the minds of the contracting parties never met, and that there was therefore no contract between them; and (2) that the coal which the appellant refused to accept did not comply with the contract.

Mutual assent is necessary to the formation of every contract, and any mistake of the parties by which one of the contracting parties has in mind one thing as the subject-matter of the contract, and the other party has in mind something entirely different, and where the terms of the contract are such that it will mean either the one or the other, there is no meeting of the minds of the contracting parties, and therefore no contract. If in this case the terms of the contract entered into by the parties would properly describe domestic egg coal, and could be understood by either of the parties as meaning domestic egg coal, and would also describe steam egg coal, and could be understood by either of the parties as meaning steam egg coal, and one of them had in mind when he contracted for egg coal the higher grade of coal, and the other had in mind when entering into the contract the lower grade of coal, and each party believed that by the terms of the contract he was contracting for the particular kind of coal he had in mind, then no contract was entered into between the parties. 24 Am. and Eng. Encyc. of Law (2d ed.), § 1034, and cases cited.

It is the contention of the appellant that the coal which was the subject-matter of the contract was bought by the appellee for the purpose of making steam, and that it was sold by the appellant for that purpose, and therefore that there was no room for any misapprehension as to the grade of coal the contract called for. The contract itself, as before stated, is silent as to the grade of egg coal to be furnished. It is true the evidence does show that the coal was to be used for the purpose of making steam, but it by no means follows that the higher grade of coal might not well be meant and understood by the terms of the contract. The president of the appellee testified, in reference to the circumstances under which the order for the coal was given, as follows: "This young man who sold this coal to me quoted it at $1.85 f. o. b. our switch, and I told him I could not pay any such money, and I said: 'What rate can you get on that coal?' And he goes to the telephone and said, 'I will talk to Mr. Miller in regard to that;' and he asked me what I could pay for that coal, and I said, 'I have been buying Indiana egg, double-screened coal, absolutely clean, for $1.75,' and he called Mr. Miller up regarding the freight only. . . . And after this man finished his talk with Mr. Miller, he turned around to me, and he said: 'The rate is all right, and I will put it in here for $1.75,

Digitized by Google

if you can use two cars.'" This is all the evidence upon the subject of what took place at the time the contract was made that would tend to throw any light upon the subject as to what was meant by the term "Indiana egg" coal. From this conversation had at the time the contract was entered into the appellee had the right to believe that the egg coal which the appellant was contracting to furnish him was the kind of egg coal that he referred to as having been bought for $1.75 per ton, and that was double-screened coal. The construction of a contract is for the court, and not the jury. Here the contract is in writing, for the delivery of two cars of egg coal at $1.75 per ton f. o. b. cars on appellee's switch. There is no dispute but what there is a grade of coal known as "double-screened egg coal." There is no dispute but what at the time the contract was entered into appellee's president, who was contracting for the appellee, said to the appellant's salesman, who was contracting for the appellant, with reference to the coal, in response to an inquiry from the salesman as to what he could pay for that coal, "I have been buying Indiana egg, double-screened, absolutely clean, for $1.75;" and that thereupon, after some conversation over the 'phone with the appellant's agent at their office, he said to the president, "We will put it in here for $1.75, if you can use two cars." This conversation could leave but one impression upon the mind of the president of the appellee, and that was that the coal that the appellant was to furnish at $1.75 per ton was the same grade of coal that he had been theretofore paying the same price for — that is, double-screened Indiana egg coal — and a contract made under such circumstances by the buyer calling for Indiana egg coal, where the term "Indiana egg" coal might mean one of two grades of coal, could be held as a matter of law to mean only the higher grade. And not only had the buyer the right to so understand the contract, but the seller would be bound by such an interpretation of the contract. There being no claim by the appellant that the car load of coal was of this grade, no mistakes made by the court in ruling upon the admission or rejection of evidence, or the instructions given to the jury would constitute reversible error.

The judgment is affirmed.

COMSTOCK, MYERS, HADLEY, and WATSON, JJ., concur. ROBY, C. J., absent.

Digitized by Google

Digitized by Google

Bills and Notes: Drafts: Acceptance: Negotiable Instruments Law.

The National Park Bank was the holder of a draft, in effect the same as the illustration, and sued the drawee, Philip S. Saitta, who had accepted the draft. One Mauro drew the draft to the order of himself upon Philip S. Saitta, of Genoa, Italy. The said Saitta accepted the draft and according to the complaint, after the draft had been accepted, it was transferred before maturity and for value to the plaintiff, the National Park Bank. The defendant contended, on the other hand, that the drawer, Mauro, presented the bill to the plaintiff bank for discount, and at the time of the presentation there were annexed to the bill of exchange, bills of lading, and that the plaintiff discounted the bill of exchange upon the security of the bills of lading and the defendant further contended that the draft was accepted by him but that it was done upon the express understanding that the bills of lading would be delivered to him. The defendant's dealings were with the Banca Commerciale, the agent of the plaintiff at Genoa, and the defendant attempted to prove that he had accepted the draft with the understanding that his acceptance would be stricken from the draft unless the bills of lading were delivered to him. This latter proof was controverted by the plaintiff. The defendant practically admitted the execution of the bill of exchange, its presentation to him before maturity and his acceptance, and the transfer for value before maturity to the plaintiff, and the defense relied upon by the defendant is failure of consideration. Judgment was rendered for the plaintiff and this was affirmed by the Appellate Division of the Supreme Court of New York. The Appellate Division stated in its opinion that the charge of the court to the jury was far more favorable to the plaintiff than to the defendant, and notwithstanding the charge the jury found in favor of the plaintiff on this question of fact, as to whether or not the acceptance was made with the understanding on the part of the de-

Digitized by Google

fendant with the plaintiff's agent, that the acceptance was to be stricken from the draft unless the bills of lading were delivered to the defendant. On the point as to whether or not there was a failure of consideration the court made the following observations: Under the Negotiable Instruments Law the holder of a draft may present the same for acceptance at any time, even though the draft is payable a fixed time after date and where the acceptance cannot be obtained, the bill may be treated as dishonored and then the holder has an immediate right of recourse against the drawer and indorsers. Furthermore, the bill of exchange implies a representation upon the part of the drawer that he has funds in the hands of the drawee sufficient to pay the draft, and by accepting the draft the drawee admits the truth of this representation.

The court said in part:

"The defendant also attempted to establish that he had accepted the draft in reliance upon the promise that the bills of lading would be delivered upon such acceptance, and that at the time of acceptance he informed the plaintiff's agent that he was only accepting the draft on the understanding that the bills of lading would be delivered to him. This testimony was also controverted by testimony for the plaintiff. Although the answer did not squarely present that defense, the court charged:

"'That if you find that at the time the defendant wrote his acceptance across the face of the draft he demanded that the plaintiff's agent deliver to him the bill of lading accompanying the same, and that he informed the plaintiff's agent at such time he was only accepting the draft on the understanding that such bill of lading would be delivered to him, and then and there demanded that his said acceptance be stricken from the said draft unless the said bill of lading should be delivered to him, and that the plaintiff and its agent refused to deliver the said bill of lading and refused to strike said acceptance from said draft, you may find that the writing of the word "accepted" across the face of said draft, followed by the signature of the defendant was not intended to be and was not in fact an acceptance of said draft and you may treat the same as if it had not been written by the defendant and may find a verdict for the defendant'

"This was a far more favorable charge than the defendant was entitled to upon his pleadings. The jury resolved this question in favor of the plaintiff. So that both of the foregoing questions, upon which the evidence was conflicting, were submitted to the jury in a charge favorable to the defendant, and having been found against him by the jury, we cannot say that that finding was contrary to the evidence or against the weight thereof. The final point to be considered is the defense of failure of consideration. The Negotiable Instruments Law (chapter 612, p. 727, of the Law of 1897) provides, in section 50:

"'Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value.'

Digitized by Google

£ 13,750 New York, N. Y. Aug 1, 1905

Sixty days after date Pay to the

Order of Philip Zuaero

Fifteen thousand seven hundred fifty Pounds

Value received and charge the same to account of

To Philadelphia Swiss Italy

No.

Accepted Aug 29 1905

Philip Zuaero

UNZ & CO., PRINTERS, 24 BROADWAY, NEW YORK.

Digitized by Google

Pay to the order of
the National Park Bank
of New York City
Philip Mauro.

The National Park Bank is the holder of this draft and the plaintiff in this action, and it stated in its complaint against the drawee, Philip S. Saitta, that the draft was drawn by Philip Mauro to the order of Philip Mauro upon Philip S. Saitta in Genoa, Italy, that the bill was accepted subsequently by said Saitta and thereafter the bank became the holder before maturity and for value. The defendant answered and attempted to establish that the bill was presented to the National Park Bank for discount and discounted by it, and at the time it was presented for discount, the bank received from the defendant certain bills of lading, upon the security of which the bill was discounted, and that thereafter the defendant accepted the draft upon the understanding with the Banca Commerciale, the agent of the plaintiff, National Park Bank, that his acceptance was in consideration of the delivery to him of these bills of lading and that his acceptance was to be stricken from the draft unless the bills of lading were delivered to him. The defendant obtained a very favorable charge on this point from the court to the jury and notwithstanding this favorable charge, the jury decided this question of fact against the defendant. The defendant admits the execution of the draft, the acceptance by him and the delivery and discount by the plaintiff for value before maturity and the defense is failure of consideration. Judgment was rendered in favor of the plaintiff, which the Appellate Division affirmed, and in its opinion quotes several sections of the Negotiable Instruments Law, which can be summed up as follows: That every person whose signature appears upon a negotiable instrument is presumed to have become a party thereto for value, and that the holder of a bill may treat the same as dishonored if acceptance of the drawee is refused or cannot be obtained, and where a bill is presented and is not accepted the holder has an immediate right of recourse against the drawer and indorsers.

The Appellate Court also called attention to the fact that when a bill of exchange is drawn there is an implied representation upon the part of the drawer that he has funds in the hands of the drawee sufficient to pay the draft and that when the bill of exchange is accepted by the drawee he virtually admits the implied representation of the drawer. It being conceded that the plaintiff was a bona fide holder for value, the laws applicable to bills of exchange establish that the defendant failed in his defense of want of consideration flowing for his acceptance.

Digitized by Google

"When this defendant accepted this bill, he therefore was presumed to have accepted it for a valuable consideration. Section 221 provides:

"'That the holder of a bill, presenting the same for acceptance, may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored.'

"This provision is not confined to sight bills, but seems to be applicable to all bills of exchange. Consequently, if the bank in Genoa had presented the bill to the defendant for acceptance, although the date of payment was fixed and the drawee had refused to accept it, the plaintiff would have been entitled to treat the bill as dishonored, and would have acquired the immediate right to call on the other parties to the bill.

"Section 246 of the Act provides:

"'A bill is dishonored by non-acceptance when it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained.' Section 247:

"'Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.'

"Section 248:

"'When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.'

"'Although, when such a bill is made payable at a day certain at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection.' Allen v. Suydam, 17 Wend. 368.

"'A bill payable at a fixed period from its date may be presented for acceptance at any time.' Bachellor v. Priest, 12 Pick. (Mass.) 399; Oxford Bank v. Davis, 4 Cush. (Mass.) 188.

"It is settled that as between remote parties to a bill of exchange, as the payee or indorsee and the acceptor, in order to sustain the defense of no consideration, two considerations at least must come in question: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title.

"'An action between remote parties will not fail unless there be absence or failure of both of these considerations. It is immaterial when an acceptance is made. It may be made at any time, and the rights of payees and the indorsees are the same after it is made, whether they were acquired in anticipation of it or subsequent to it. Where, as in the case at bar, there is an acceptance upon the bill, it makes no difference in the rights of the payees or indorsees whether they became so before or after the acceptance. The instrument is negotiable before acceptance, and the acceptance is an acknowledg-

Digitized by Google

ment of the debt it represents and absolute promise to pay it to the person who is or shall become the holder of the bill; and to allow a want of consideration for the acceptance to defeat the right of a bona fide holder, whether he became such before or after the acceptance, would be contrary to the nature and purpose of bills of exchange and to the uniform usage in regard to them.' Arpin v. Ownes, 140 Mass. 144, 3 N. E. 25; Daniel on Negotiable Instruments (5th ed.) 174a.

"In Heuertematte et al. v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657, the action was brought upon defendant's acceptance upon a bill of exchange drawn upon him at ninety days. Defendant offered to show that the acceptance was made without consideration and was induced by fraudulent representation on the part of the drawer. This was objected to and excluded. Ruger, C. J., said:

"'If a party becomes a bona fide holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. . . . By such acceptance the drawee admits the truth of the representations, and, having obtained a suspension of the holder's remedies against the drawer and an extension of credit by his admission, is not afterward at liberty to controvert the fact as against a bona fide holder for value of the bill. The payment to the drawer of the purchase price furnishes a good consideration for the acceptance, which he then undertakes shall be made, and its subsequent performance by the drawee is only the fulfillment of the contract which which the drawer represents he is authorized by the drawee to make. The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration or for accommodation, as against a bona fide holder for value of such paper, flows logically from the conclusive force given to his admission of funds and is elementary.'

"As it is conceded that the plaintiff was the bona fide holder for value of the bill in question, the foregoing statutory provisions and authorities conclusively establish that the defendant failed in his defense of want of consideration flowing to him for his acceptance.

"As we have discovered no error in this record which requires interference with the judgment, the judgment and order appealed from should be affirmed, with costs to the respondent. All concur."

See Decision No. 1098.

Bills and Notes: Bona Fide Holder: Knowledge of Officer: Notice to Corporation.

The defendant, Marshall Bruce, executed the illustrated promissory note, payable to the order of the National Separator Company. The Separator Company subsequently transferred it to Rice McDonald and he in turn transferred it to the Penfield Investment Company, the plaintiff in this action. The Separator Company and the Penfield

Digitized by Google

Bills and Notes: Bona Fide Purchaser.

$750 00/100

St Joseph Mo. May 21 1904

Six months after date I promise to pay

to the order of National Separator Company

Seven hundred and fifty and no/100 Dollars

at St Joseph Mo

Value Received

No. Due

Marshall Bruce

Digitized by Google

National Separator
Company by
E. L. Worthman
Vice President

Rice McDonald
Penfield Investment Co
By A. H. Penfield, President

The Penfield Investment Company, the holder of this note, sued the maker, Marshall Bruce. Bruce executed the note to the order of the National Separator Company, who transferred it to Rice McDonald and the latter in turn transferred it to the plaintiff, Penfield Investment Company. The National Separator Company and the Penfield Investment Company are corporations and it was proved at the trial on the part of the defendant that A. H. Penfield, who was the president of the Penfield Investment Company, was also an officer and a director of the National Separator Company. The defendant proved that he made the note in consideration of the privilege of representing the National Separator Company in the county of Clinton, Mo., and that the note was paid out of the commissions which he received on the sales of machines made by the Separator Company and he also proved that if the note remained unpaid at the end of six months it was to be null and void and defendant was not to be liable for its payment. Notwithstanding this contract, which was in writing, the note was transferred as stated above. Judgment was rendered in favor of the defendant, Bruce, and the plaintiff appealed. The judgment was reversed because the trial court had refused to charge the jury that notwithstanding the fact that there was fraud in the inception of the note, and the payee, the National Separator Company, executed a contract in writing, by which it agreed not to transfer the note and notwithstanding the fact that A. H. Penfield, the president of the Penfield Investment Company, was also an officer of the National Separator Company and knew of the contract, still, unless his knowledge was acquired while acting as president, the Penfield Investment Company would not be charged with his knowledge.

The only theory upon which the Penfield Investment Company could recover was that it was an innocent holder for value, having acquired the note before maturity and without notice. The National Separator Cempany, the payee, could not recover against the maker, because of failure of consideration, but the Penfield Company could, provided it was an innocent holder for value before maturity. The defendant claimed that the Penfield Investment Company was a bona fide holder for the reason that the president of the Penfield Investment Company was also an officer of the National Separator Company and familiar with the circumstances under which the note was executed. The Appellate Court, however, held that unless the knowledge of the president of the Penfield Investment Company was acquired while acting as president of the Penfield Investment Company, his knowledge would not be the knowledge of the Company.

Digitized by Google

Investment Company are corporations. The note was not paid at its maturity and this action was brought by the holder, the Penfield Investment Company, to recover the amount of the note against the maker. The maker, also the defendant in this action, set up the defense that the note was obtained by fraud, and that the Penfield Investment Company was not an innocent holder for value. At the trial it was proved by the defendant that this note was given by the plaintiff to the National Separator Company for the right to represent the said Separator Company in the county of Clinton, Mo. It was proved that the separator manufactured by the National Separator Company was a machine to separate different seeds when mixed and there was evidence that while the machine worked successfully in the office of the company, it did not work successfully in other places. There was also evidence to the effect that the vice-president of the Separator Company had executed a contract in writing with the defendant, wherein it was agreed that this note for $750 and two notes for $375 each were to be paid out of commissions received by the defendant and maker of the illustrated note from the sales which he made as the agent of the Separator Company and that if the notes remained unpaid at the end of six months, they were to be null and void and the defendant was not to be liable for their payment. A. H. Penfield was the president of the Penfield Investment Company, and at the time of the giving of the notes, he was an officer of the National Separator Company, although he testified that when he bought the notes he had no knowledge that the notes were not to be transferred and that he had no connection with the Separator Company at the time he bought the notes. The trial court rendered a judgment for the defendant, the maker of the note, and the plaintiff appealed. Among other things, the plaintiff complained of the failure of the trial court to charge the jury, that notwithstanding the fact that the jury might believe that there was fraud in the inception of the note, and that the National Separator Company had given a contract by which the note was to be void unless paid out of the commissions and notwithstanding the fact that the jury might believe that A. H. Penfield was an officer of the National Separator Company at the time he bought the note. as well as being president of the Penfield Investment Company, and that he knew of the circumstances by which the maker was induced to execute the note, still unless his knowledge was acquired in the performance of his duties as an officer, the Penfield Investment Company would not be bound by his knowledge. In other words, the defendant proved enough to show that he was not liable on the notes, unless the notes were in the hands of a bona fide holder, and the plaintiff, the Penfield Investment Company, claimed to be such a holder. The court held that the burden of proof had been shifted by the defendant to the plaintiff to show that it was a bona

Digitized by Google

fide holder; but it also held that the failure of the trial court to instruct the jury, as the plaintiff requested, constituted error, and that the knowledge of the invalidity of the note on the part of Penfield was not notice to the corporation, although Penfield was president of the corporation, unless it was shown that this knowledge was acquired by him as an officer of the corporation. The judgment of the trial court was reversed and the case was remanded for a new trial.

The court said in part:

"Complaint is made by the plaintiff that the court erred in not instructing the jury, under the evidence, to return a verdict for plaintiff as requested, and in refusing to instruct the jury as asked in instruction designated as 'B.' It was as follows: 'The jury are instructed that, even though you believe from the evidence that, at the time defendant executed and delivered the note in suit to the National Separator Company, false and fraudulent representations were made to him to induce him to make such executionand delivery, and that said National Separator Company gave defendant a contract by which it agreed not to assign his said note, and that said note should be void if not paid out of commissions within six months from date thereof, and though you further believe from the evidence that, at the time said note was so executed and delivered by defendant to said National Separator Company, A. H. Penfield was one of the officers thereof, and that at said time he was also president of the plaintiff, the Penfield Investment Company, and that he knew of the circumstances by which defendant was induced to execute and deliver said note, and knew of the contract given defendant by said National Separator Company, still such knowledge on the part of A. H. Penfield would not be knowledge thereof to the plaintiff, unless you also believe that said Penfield acquired such knowledge while acting as an officer of the Penfield Investment Company, and in the performance of his duties as such officer of the Penfield Investment Company.' We approve of the action of the court in refusing plaintiff's peremptory request for a verdict. After the defendant had introduced his evidence that the note was procured by fraud, the burden shifted to the plaintiff to show that he had obtained it, before due, for a valuable consideration, and without notice of such fraud. Hamilton v. Marks, 63 Mo. 167; Keim v. Vette, 167 Mo. 389, 67 S. W. 223; Bank v. Hammond, 104 Mo. App. 403, 79 S. W. 493. It was for the jury to say, upon the evidence, whether plaintiff had shown to their satisfaction that it was an innocent purchaser without notice of the fraud. The jury were not bound to accept the evidence of Penfield as conclusive of the question, as there was evidence tending to impeach his veracity, and they were the sole judges of the credibility of his testimony. The case turns upon the question whether instruction B contained the law applicable to the facts to which it referred. In Kearney Bank v. Froman, 129 Mo. 437, 31 S. W. 769, 770, 50 Am. St. Rep. 456, it is said that: 'The law is well settled in this State that knowledge which comes to an officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation.' And that: 'This is a rule, though

Digitized by Google

the officer obtaining the knowledge was, at the time, the managing agent of the corporation.' 'When one is an officer of two corporations, and they have business transactions with each other, the knowledge of the common officer cannot be attributed to either corporation in a matter in which he did not represent it.' Benton v. German American Nat. Bank, 122 Mo. 332, 26 S. W. 975. 'Knowledge of the cashier of a bank, obtained by reason of his interest and connection with other parties, but not obtained in the performance of any duty he owed the bank, is not notice to the bank.' Bank v. Fitze, 76 Mo. App. 356. 'The knowledge of facts which is acquired by the officer of a corporation in the course of his private business, and not in his official capacity, does not constitute the knowledge of the corporation, and does not constitute notice to the corporation.' In Carroll v. People's Railway, 14 Mo. App., loc. cit. 498, the court said: 'But whether the president and directors had such knowledge or not, the corporation, nevertheless, had knowledge; for it is a rule of law that whatever a general agent of a corporation knows, when acting within the scope of his agency, touching the business of his agency, is the knowledge of the corporation.' The decision is entirely in harmony with those already referred to. In Hayward v. Ins. Co., 52 Mo. 181, 14 Am. Rep. 400, the court held that notice to the agent of an insurance company, while his agency existed, of subsequent insurance on the same property, was notice to the company. The court said: 'A corporation only acts through and by agents, and the proper and only way to give notice to a corporation is to notify an agent, and generally it is sufficient to notify an agent whose proper business is to attend to the matter in reference to which the notice is given.' It is not seen that this case has any application to the question under consideration, nor has that of George v. Railroad, 40 Mo. App., loc. cit., 445. In Chouteau v. Allen, 70 Mo., loc. cit., 341, Sherwood, J., in speaking of the knowledge of Webber, the agent of plaintiff, said: 'Webber's agency being established, his knowledge acquired, not only during the continuance of his agency, but also that possessed by him so shortly prior to his employment, as necessary to give rise to the inference that it remained fixed in his memory when the employment began, must be deemed the knowledge of Chouteau.' The language, which refers to the knowledge the agent possessed at the time of his employment, recently acquired, being imputed to the principal, might be construed as in conflict with the rule, otherwise stated, that knowledge acquired by the agent in his own private affairs, and not in his capacity as agent; it is not to be imputed to the principal. But, however that may be, the doctrine is not the latest expression of our Supreme Court upon the question. In Stonecutter v. Myers, 64 Mo. App. 527, this court said: 'The whole matter is this: W. B. Myers, as president and sole manager of the defendant stove company, purchased the machine from the individual, W. B. Myers, and at the time said officer acquired and had full knowledge that there was a balance due thereon. This knowledge bound the corporation for whom Myers was acting.' The facts were that Myers was not only acting for himself, but at the same time he was acting for the corporation. In Savings Bank v. Thomas, 2 Mo. App. 367, it was held 'That notice to a director of a bank of facts affecting the character of negotiable paper is notice to the bank.' It was shown that

Digitized by Google

the director of the bank was notified, before the note was discounted, of the character of the paper, and he was present at the board of directors when the note was offered for discount and received by the bank. The case is somewhat different from that of Kearney Bank v. Froman, supra, where the knowledge was obtained while the director was not engaged in the business of the bank. We can see nothing inconsistent in the case from the general rule announced in all the cases, save and excepting that of Chouteau v. Allen, supra. For the error of the court in refusing instruction B, the cause is reversed and remanded."

See Decision No. 1099.

Bills and Notes: Undisclosed Principal: Vendor and Purchaser.

The plaintiff in this action is the Coaling Coal & Coke Company, of which the payee of the illustrated promissory note, D. C. Lyle, is the president. The Coaling Coal & Coke Company sold to R. E. Watson, acting as agent for himself and others, certain lands in Alabama, the consideration being $20,000. Five thousand dollars was paid down and the balance of the purchase price was represented by two promissory notes for $7,500 each, in effect the same as the illustration. It will be noted that the note is payable to D. C. Lyle, president, and is executed by R. C. Watson, trustee. It was proved at the trial that the plaintiff, the Coaling Coal & Coke Company, at the time of the execution of the notes, did not know that R. C. Watson was acting as the trustee and agent for others, who were undisclosed principals in the transaction. The land was transferred to him and he really held it as the agent for himself and the others, who are the defendants in this action. The notes were signed by Watson as trustee by the agreement and authority of all the other defendants. By amendment the petition of the plaintiff was made to state a cause of action upon the original transaction and not upon the notes. The judgment of the trial court was for the defendants, for the reason that they could not be held as their names were not signed to the notes. The note would have to be treated the same as though the word president was not after Lyle and the word trustee was not after Watson. In other words, these words are simply descriptio personæ and have no more force than as though the note was made payable to D. C. Lyle, republican, and signed R. E. Watson, democrat. The note is really payable to D. C. Lyle and executed by R. E. Watson and it has the effect of an individual transaction between these two individuals. The Appellate Court, however, held that whereas an undisclosed principal cannot be charged upon a negotiable note, an undisclosed principal could be held liable in a suit upon the original transaction. In other words, if the principals themselves had exe-

Digitized by Google

$ 7500 Birmingham Ala June 30th 1901

One year after date I promise to pay to the order of D. B. Lyle, President Sloss Furnace Co Seventy Five Hundred & 00/100 Dollars at First National Bank Birmingham Ala with interest at the rate of ten per cent per annum and to pay attorney's fees if collection is enforced and place as retainer

No. Due

E. C. Watson

Endorsed.

D. C. Lyle, President

R. E. Watson, trustee, executed this note to D. C. Lyle, the president of the plaintiff, Coaling Coal & Coke Company, in consideration for land purchased by Watson as agent for himself and others from the plaintiff corporation. The note was executed by Watson, trustee, by the agreement and authority of the others associated with Watson in the purchase of the land. The trial court rendered a judgment in favor of the defendants for the reason that their names did not appear upon the note and undisclosed principals could not be held liable upon a negotiable note. The trial court held that the execution of this note was a transaction between the individual Lyle, as payee, and Watson, as maker. It held that the words "president" and "trustee" meant nothing. They were merely descriptio personæ and had no force and effect. The Appellate Court, however, reversed the judgment of the trial court, sustaining the theory that this note was an individual transaction between the parties, whose names appear upon it, but also holding that a suit could be brought against the undisclosed principals upon the original consideration. In other words, the land having been transferred to Watson as trustee, and he holding it as trustee for the others, and the other defendants being the equitable owners of the land, the plaintiff could sue the defendants for the purchase price. The Appellate Court, however, held that the trial court was right in its theory that the undisclosed principals could not be charged with the payment of the note, since an undisclosed principal cannot be held liable upon a negotiable note. If the principals themselves had given the note, they could have been sued on the original consideration and if taking the note of the principal would not have destroyed the right of the plaintiff to sue upon the original consideration, how could the taking of the note of their agent have that effect?

Digitized by Google

cuted this note, they could have been sued upon the original consideration and the court held that if taking the note of the principals themselves would not have destroyed the right of the plaintiff to sue upon the original consideration, the right was not abrogated by taking the note of the agent of the undisclosed principals. The judgment of the trial court was reversed, the court saying in part:

"None of the defendants except Watson are concerned with the surrender and cancellation of the notes. As they are negotiable notes, and as Watson is the only one who signed them, Watson is the only one who could be sued upon them. But, as to Watson, it would not be necessary to surrender them before the trial; it being sufficient for the plaintiff to have the notes at the trial for surrender and cancellation. Jackson v. Brown, 102 Ga. 87, 29 S. E. 149, 66 Am. St. Rep. 156; Belmont Farm v. Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312; 8 Cyc. 24. The plaintiff avers in the amendment which was disallowed that it has the notes, and is ready and able to surrender and cancel them. The plaintiff could maintain the suit in its name, as it alleged that it owned the property and its president, Lyle, acted for it in making the contract, and the purchase price under the contract is due to the plaintiff. Atlanta & W. P. R. Co. v. Texas Grate Co., 81 Ga. 602, 9 S. E. 600. According to the allegations of the petition, the plaintiff, a corporation, owned a tract of land in Alabama. Its president, acting for it, sold the land for $20,000 to R. E. Watson, acting for and in behalf of himself and the other defendants, who became the owners and obtained the possession, use, and benefit of the property under their purchase thus made. Five thousand dollars was paid to Lyle by Watson on the purchase price, which amount was furnished by the defendant for the purpose of being so paid. Notes were taken for the balance of the purchase money, signed by Watson, trustee, and payable to Lyle, president. These notes were dated at Birmingham, Ala., and payable at a bank in that city. A deed was made in Georgia, in the usual form, by Lyle, as president, to Watson, as trustee. Lyle was acting for and in behalf of the plaintiff, in the transaction, and Watson was acting for and in behalf of himself and the other defendants, but it was not known to the plaintiff at the time of the transaction that Watson was acting as agent for and in behalf of the defendants. Can this suit on the original consideration, outside of the notes for the purchase price of the property, be maintained against the defendants? The word 'president' after Lyle's name, and the word 'trustee' after Watson's name, in the notes are merely descriptio personæ; and, there being nothing on the face of the papers to indicate who was to be charged as principal, these notes will have to be treated in the same manner as if such descriptive words were not used, and such notes will, prima facie, have to be considered as expressing an individual transaction between Lyle and Watson. The notes are negotiable instruments, and a suit could not be maintained on them against undisclosed principals. It was generally true, at common law, that a suit could be maintained against undisclosed principals on a written contract, but there were exceptions to this rule, among which were that undisclosed principals could not be held liable in a suit upon negotiable instruments, nor upon instruments under seal, and

Digitized by Google

this is now the law as ruled by this and other courts and announced by many text writers. Lenney v. Finley, 118 Ga. 718, 45 S. E. 593; Van Dyke v. Van Dyke, 123 Ga. 686, 51 S. E. 582; Burkhalter v. Perry, 127 Ga. 438, 56 S. E. 631; 1 Clark & Skyles on Law of Agency, §§ 327, 459, 464; 1 Dan. Neg. Inst., § 303. This is also true where the words 'as agent,' or 'as trustee,' occur after the signature of the maker of the negotiable instrument, without disclosing the name of the principal, or without sufficiently indicating on the face of the instrument who the principal is. 1 Clark & Skyles on Law of Agency, §§ 275, 276, 328; 2 Paige on Contracts, § 761; Tiffany on Agency, p. 245. It is true, according to the weight of authority, that a suit cannot be maintained on the original consideration where at the time of the making of the contract the parties entered into a contract under seal, because the simple contract was merged into the higher contract under seal. This has also been held to be the law by decisions of this court. In the cases of Lenney v. Finley and Van Dyke v. Van Dyke, cited supra. In the former case there was a lease contract under seal, and it was held that no suit could be maintained outside of the contract against an undisclosed principal for use and occupation. In the latter case it was held that a note under seal could not be disregarded and an undisclosed principal held liable for the money loaned. Suit can be maintained on the original transaction, outside of the written instruments, where the instrument is not under seal. 8 Cyc. 24 (note or bill taken); Burch v. Harrell, 93 Ga. 719, 20 S. E. 212; Tumlin v. Bass Furnace Co., 93 Ga. 594, 20 S. E. 44; Southern Printing Co. v. Felker, 125 Ga. 148, 54 S. E. 193; Wylly v. Collins, 9 Ga. 223; 2 Page on Contracts, § 789, pp. 1203-1205. Where a negotiable note is given, an undisclosed principal cannot be held liable on the note, but such undisclosed principal can be held liable in a suit on the original consideration or debt. 2 Page on Contracts, § 761, pp. 1149, 1150; Harper v. Tiffin Nat. Bank, 54 Ohio St. 425, 44 N. E. 97. The reason an undisclosed principal cannot be held liable in a suit upon a contract under seal or a negotiable instrument is, not because of the parol evidence rule, but because of the nature of these instruments. One simple contract does not merge or liquidate another simple contract. Wylly v. Collins, 9 Ga. 223. A negotiable note not under seal is a simple contract. If the defendants were really the undisclosed principals of Watson in buying the land, and no note had been given, there would be no doubt as to the right of the plaintiff to hold the undisclosed principals liable for the purchase price in a suit on account therefor. The taking of a simple contract in writing did not extinguish this right. The fact that the simple contract for the purchase money in writing was a negotiable promissory note cannot alter the principle. There is no suit on the notes. If the principals themselves had given the notes, this would not liquidate the unsettled account for the purchase price, and the principals would have had the right to sue on the original consideration and recover the purchase price. If taking the note of the principals themselves would not have destroyed the right of the plaintiff to sue upon the original consideration, how could the taking of the note of their agent or that of any other person have this effect? What has been said does not conflict with the principle that when a note, or bill of exchange, or other writing

Digitized by Google

is taken for a debt from the party owing it, or their agents, or from any other person, and there is an understanding that it is accepted as payment, such understanding and agreement is binding on the party accepting such writing, and will be enforced by the courts."

See Decision No. 1100.

Bills and Notes: Bona Fide Purchaser: Blank Notes: Negotiable Instruments Law.

Wilson R. Hunter, the plaintiff in this action, is the holder of a promissory note, which was transferred to him by the First National Bank of Durham, N. C. The note was transferred to him subsequent to its maturity, consequently any rights which he had in the paper were as an assignee of the First National Bank and he could acquire no greater rights than they. The notes were executed by I. N. E. Allen & Co., who were lumber commission merchants in New York City, composed of the defendant Bacon and a man by the name of Allen. Bacon claimed to have retired from the partnership and by agreement Allen was to assume the liabilities of the firm and wind up the partnership affairs. Allen became interested in the North State Lumber Company, which did business near Durham, N. C., and the North State Lumber Company did business with the First Nation Bank of Durham. To meet the over-drafts of the North State Lumber Company, Allen sent a number of blank notes, which were payable to the lumber company, and signed by I. N. E. Allen & Co. They were blank as to date, time of payment and amount and the cashier of the bank or some one under his authority filled in the blanks as the occasion required. Allen, as president of the lumber company, authorized the cashier to fill in the blanks and in as large amounts as the bank would take. The notes were not paid and were transferred after their maturity to the plaintiff in this action. Had the plaintiff in this action become a purchaser of the notes before their maturity, he would probably have been a bona fide holder provided he had no knowledge of the circumstances surrounding the execution of these notes, but by becoming a purchaser subsequent to the maturity of the notes, he did not acquire the notes in due course. He was simply an assignee of the bank and acquired no greater rights than the bank and if the bank was not a bona fide holder, the plaintiff in this action could not be a bona fide holder. The defendant, Bacon, contended that the bank was not a bona fide holder as a matter of law and the Appellate Division of the Supreme Court in reversing the judgment of the trial court held that the bank was not a bona fide holder for the reason that the notes, when delivered to the bank, were not complete and regular upon their face.

Digitized by Google

The Negotiable Instruments Law of the State of New York provides that "A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face."

The judgment of the trial court in favor of the plaintiff was reversed and the case was sent back for a new trial in accordance with the instructions given by the Appellate Division.

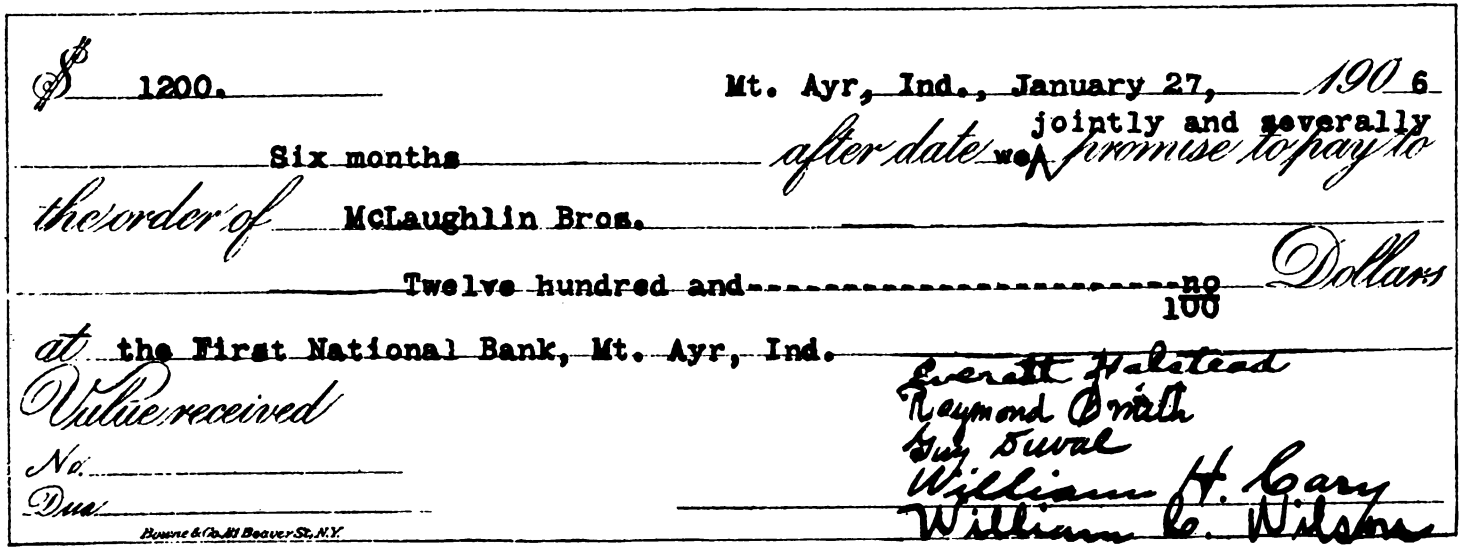
The court said in part:

"The notes purported to be made in New York State, and were payable there, and by the express provisions of the Negotiable Instruments Law (Laws 1897, p. 719, c. 612) one can be a holder in due course of a negotiable instrument only where the instrument is 'complete and regular upon its face.' This statutory provision is but a codification of the rule of the law merchant, which was that a party buying commercial paper which remains in some essential particular incomplete and imperfect does not acquire the character of a bona fide holder. Davis Sewing Machine Co. v. Best, 105 N. Y. 59, 11 N. E. 146. The situation is not such as existed in Chemung Canal Bank v. Bradner, 44 N. Y. 680. In that case a draft containing blanks was in the possession of the holder, and it was held that authority on his part to fill them in could be assumed from his possession. The decision was based on the doctrine that, because apparent authority had been given, it would be a fraud upon innocent parties to permit an assertion to the contrary. Town of Solon v. Williamsburgh Savings Bank, 114 N. Y. 136, 21 N. E. 168. In the present case, as to the August 4th notes, the blank notes were sent to the bank and filled in by the bank officer. There was no reliance on possession as evidencing authority to complete the instrument. On the former appeal this court in effect held that the bank was not a bona fide holder, and it is conceded that plaintiff, by his purchase after maturity, acquired no such right unless he obtained it through the bank itself. The trial court was requested by the appellants in various forms to hold and to charge the jury that neither the bank nor the plaintiff was a bona fide holder, and his refusal was error, for which the judgment must be reversed. On the former appeal, however, this court held that there was a question of fact as to whether the notes were as to Bacon in fact accommodation paper, or whether they were given in the course of the business of Allen & Co. Even if the notes were accommodation paper, because they were given outside the business of the firm, the appellant, Bacon, would be liable if he authorized them to be given, or if he ratified the giving of them with knowledge of the facts, or omitted to stop their issue after knowledge. Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547. The plaintiff claims that they were not acommodation notes given outside the business, but were given in the business of the firm of Allen & Co.; and he also insists there is evidence of knowledge or ratification, and that in fact there was no dissolution of the firm. The appellant insists that there is no evidence sufficient to sustain a verdict upon any of these issues, and asks that the complaint be dismissed."

See Decision No. 1101.

Digitized by Google

Bills and Notes: Effect of Material Alteration.



$ 1200. Mt. Ayr, Ind., January 27, 1906

Six months after date we jointly and severally promise to pay to the order of McLaughlin Bros.

Twelve hundred and no/100 Dollars

at the First National Bank, Mt. Ayr, Ind.

Value received

No.

Due

Everett Halstead
Raymond Smith
Guy Duval
William H. Cary
William C. Wilson

Bourne & Co. 31 Beaver St. N.Y.

Digitized by Google

Mc. Loughlin Bros
P'd $ 200 by B. B. Miller

The plaintiff in this action, the Citizens' Savings Bank, sued the makers of this note and the defense set up by the makers was that the note had been materially altered subsequent to its execution and without their knowledge and consent, and that they were thereby released. It is a well-settled principle of law that a material alteration renders a note invalid if the note is altered subsequent to its execution and without the consent of the indorsers or makers. In this case the makers contended that the note was materially altered, in that when they signed it the name of one B. B. Miller was upon it, and subsequently this name was erased. The court held that the erasure of the name of one of the joint makers of the note after delivery and without the knowledge of the other makers was a material alteration. The plaintiff denied that the name of Miller was ever on the note, and Miller himself testified that he did not sign the note, but there is a credit on the back of the note showing a payment of $200 by Miller, and the jury found with the defendants on this question and the Appellate Court of Indiana affirmed the judgment of the trial court in favor of the defendants, holding that the makers were released by the material alteration of the note, subsequent to its execution and without the consent of the other joint makers.

Digitized by Google

Bills and Notes: Material Alteration.

The plaintiff, the Citizens' Savings Bank, is the holder of a note in effect the same as the illustrated one, having acquired the same from the payees, McLaughlin Bros. Among other defenses the defendant set up that the note was materially altered, without the knowledge or consent of the makers, who were sued, after its execution by them. They contended they were released by this material alteration. They contended that the name of one B. B. Miller was signed to the note at the time the other makers signed it, and that it was subsequently without their knowledge or consent erased. Miller testified that he did not sign it, but the note bears an indorsement showing a credit for $200 paid by Miller. The jury determined this question, of whether or not Miller had signed the note in favor of the defendants and rendered a verdict in favor of the defendants, and from such verdict the plaintiff appealed. The judgment was affirmed.

The court said in part:

"The plea of non est factum of appellees avers, in substance, that said note was signed by appellees and one B. B. Miller, and that his name was signed thereto when delivered; that after the delivery of said note, and without the knowledge or consent of appellees or either of them, the said name of B. B. Miller had been erased, and did not appear upon the note sued on; that said Miller was a principal and jointly liable on said note, and by the erasure of his name said note was materially altered, and it was not therefore their note. That the material alteration of a note renders it invalid in the hands of a bona fide holder, as well as in the hands of the original payee, is well settled. Young et al. v. Baker et al., 29 Ind. App. 130, 64 N. E. 54; Cronkhite v. Nebeker et al., 81 Ind. 319, 42 Am. Rep. 127; Dietz et al. v. Harder et al., 72 Ind. 208; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Webb v. Corbin, 78 Ind. 403; Hert v. Oehler, 80 Ind. 83; Erickson v. First Nat. Bank, 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. Rep. 753; Wiltfong v. Schafer, 121 Ind. 264, 23 N. E. 91. And the erasure of the name of one of the joint makers of a note after delivery and without the knowledge of the other makers is a material alteration. Gillett et al. v. Sweat, 6 Ill. 475; Nicholson v. Revell, 6 N. & M. 192; Coke's Litt. 232; Cheetham v. Ward, 1 Bos. & Pul. 630."

See Decision No. 1102.

Banks and Banking: Savings Banks: Deposits.

The plaintiff, Mr. Anderson, brought this action against the Hough Ave. Savings & Banking Company, to recover the amount of two deposits which he had in the savings bank, and which the savings bank had paid out to some person unknown to him, who had stolen his pass book and forged an order authorizing the payment to himself. The

Digitized by Google

plaintiff, Mr. Anderson, at the time of making his first deposit, signed a deposit card by which he agreed to the rules and regulations governing the savings bank deposits and among those rules printed on the pass book, was one to the effect that a depositor shall immediately notify the bank when a pass book has been stolen or lost and in case a payment is made upon presentation of a deposit book, it shall be a discharge to the bank for the amount so paid. The plaintiff made his last deposit in July, 1903, and he did not go to the bank again until July, 1904, and he did not see his bank book after October, 1903. A man by the name of Christensin, who was known to the paying teller of the bank, in October, 1903, presented to the bank a written order transferring Anderson's account to him, and it transpired subsequently that this order was a forgery. The judgment for plaintiff was affirmed by the Supreme Court of Ohio. In this connection it may be stated that upon the appeal, the name of the appellant is printed first, and the case on appeal is that of Hough Ave. Savings & Banking Company v. Anderson, whereas in the lower court the case was Anderson v. Hough Ave. Savings & Banking Company. Anderson was the plaintiff and Hough Ave. Savings & Banking Company was the defendant, but as the judgment was rendered in favor of the plaintiff and the defendant appealed, on appeai the title of the action was reversed, as above stated. The defense of the Hough Ave. Savings & Banking Company and the grounds of their appeal were that as no notice had been given to them of the loss of the book and as they had paid out the money upon the presentation of the book; and by the rules, to which the plaintiff had agreed, they were to be discharged by such payment, they were not liable, but the trial court and the Supreme Court held that not withstanding these rules, and the contractual relations of the parties, it must appear that the bank exercised good faith and used reasonable care in making the payment. The courts held that in this case the bank had not exercised due diligence and were not careful in making the payment to the party presenting the book and therefore the bank was liable to the depositor whose money it had paid to another party upon a forged order.

The opinion of the court follows in full:

HOUGH AVE. SAVINGS & BANKING CO. v. ANDERSON.

(Supreme Court of Ohio. June 26, 1908.)

85 N. E. 498.

BANKS AND BANKING — SAVINGS BANKS — DEPOSITS — REGULATIONS — PAYMENT ON FORGED ORDER.

1. By-laws of a savings bank, which require the presentation of the deposit book, or due notice to the bank in case of the loss of the book, as conditions precedent to payment to the depositor, or upon his written order, are reasonable conditions and

Digitized by Google

become a part of the contract between the bank and the depositor, when brought to the notice of the latter.

2. When in such case the bank makes payment on presentation of the deposit book or pass book, not to the depositor in person, but upon what purports to be a written order by him and which turns out to be a forgery, the bank is at least bound to act in good faith and to exercise reasonable care with the view to avoid payment to a person who is not lawfully entitled to receive payment; and, if in such case it does not so act in good faith and exercise reasonable care, it will be liable to pay again to the rightful owner of the deposit.

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by one Anderson against the Hough Avenue Savings & Banking Company. Judgment for plaintiff was affirmed by the Circuit Court, and defendant brings error. Affirmed.

The defendant in error sued the plaintiff in error to recover the amount of two deposits which he had made in the plaintiff in error's bank, alleging that some person unknown to him had stolen his pass book and forged his name to an order authorizing the payment of the amount of his deposits, and that the plaintiff in error on the presentation of the said pass book and forged order negligently and without due care paid out said deposits to a party who was not entitled thereto. The case was tried to a jury, and on the trial the defendant, plaintiff in error here, requested the court to charge the jury that the bank had the right upon the presentation of the deposit book to pay the money and upon the payment by the bank on the presentation of the deposit book it was discharged from the amount so paid; and, further, that as the testimony showed that the plaintiff, the defendant in error here, did not notify the bank that his book had been stolen or lost, if the bank paid the money on the presentation of the book, it would be a discharge to the bank. The court refused to so charge the jury, but did charge that if they found from the evidence that the bank did not exercise reasonable care in making said payment, and they also found that the alleged written order which was presented with the pass book was forged, they should find for the plaintiff, which the jury accordingly did, and judgment was rendered for the plaintiff, and, after a motion for a new trial the case was taken to the Circuit Court, which affirmed the judgment, and it is now sought to reverse the judgments of both courts below. It appeared on the trial that at the time the defendant in error made his first deposit he signed a deposit card by which he agreed and assented to the rules and regulations of the bank governing savings deposits, and that among those rules, which were printed in the pass book, was the following: "(5) Deposits may be withdrawn by the depositor in person, or by written order; but in either case this pass book must be presented, that such payments may be duly entered therein. As the officers of the company may be unable to identify every depositor, the company will not be responsible for loss sustained where a depositor has not given notice of his or her book being stolen or lost, if such book be paid, in whole or in part, on presentation. In all cases, a payment upon presentation of a deposit book shall be a discharge to the company for the amount so

Digitized by Google

paid." After he made his last deposit, which was in July, 1903, he did not again go to the bank until July, 1904, during which interval he kept his bank book in his trunk, and did not see it after October, 1903. One Christensin, who resided in the neighborhood of the bank, and was known to the paying teller and who had cashed checks at the bank which had proved to be good, in October, 1903, appeared at the bank with a written order which transferred Anderson's account to him, and this order purported to be witnessed by one A. M. Crowl, and it appears to have been a forgery.

White, Johnson, McCashlin & Cannon, for plaintiff in error. Herman J. Nord, for defendant in error.

DAVIS, J. (after stating the facts as above). The plaintiff in error contends that, under the contract between the parties in this case, it cannot be held liable where payment was made upon presentation of the pass book; and that, if this contention is wrong, the testimony in this case is not such as to charge it with negligence.

These questions are new in this State, although they have been the subject of frequent adjudication in other States. These adjudications have uniformly held, where that question was involved, that by-laws of a savings bank requiring the presentation of the pass book and notice to the bank in case of the loss of the book, as conditions precedent to payment, are reasonable, and, when brought to the notice of the depositor, become a part of the contract between the bank and the depositor. But, notwithstanding the contract relations of the parties, it has been quite as uniformly held, and it does not appear to be controverted here, that the bank is bound to exercise good faith and reasonable care in making payment so that payment shall be made to the person entitled to receive payment; and this is so because public policy will not allow the bank to so strip itself of responsibility by contract as to enable it to safely pay, intentionally or heedlessly, to one who has come into possession of the pass book fraudulently or criminally. In this case the fact of negligence by the bank was submitted to and found by the jury; and we think properly so. The pass book was not presented by the depositor, but by another person, by virtue of what purported to be the depositor's written order. The teller of the bank who paid the money testified that he was not acquainted with the defendant in error, the depositor; that, so far as he knew, the latter had never been in the bank, except on the two occasions when he made deposits; that he was not familiar with his signature; and that he did not compare the signature to the order with the genuine signature in possession of the bank. His only excuse for not scrutinizing the order and comparing the signatures is that he knew the man who presented the order and pass book, and that he had before cashed checks for him which had turned out to be good. This evidence was of itself sufficient to justify the court in submitting to the jury the question of good faith and reasonable care on part of the bank, and therefore the finding of the jury was conclusive upon that point and supports the judgment. Chase v. Waterbury S. Bank, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329.

The plaintiff in error insists that since the by-law required the depositor to give notice that his pass book had been stolen or lost,

Digitized by Google

Bills and Notes: Bad Faith.

$ 380.14 Mount Holly, N. J. Nov. 1 1905

Three months AFTER DATE I PROMISE TO PAY TO

THE ORDER OF Roger Byrnes

Three hundred and eighty 14/100 DOLLARS

AT Mt. Holly, N. J.

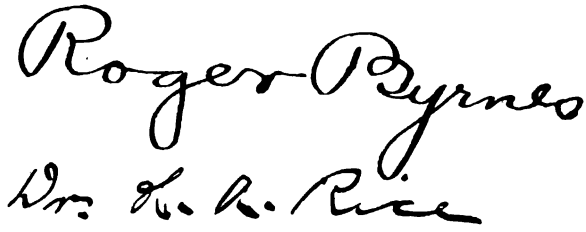
VALUE RECEIVED

R. C. Barrington

NO. DUE

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

Digitized by Google



Herbert A. Rice sued the maker of this note, R. C. Barrington, and obtained a judgment against him in the trial court, from which the defendant, Barrington, appealed, and which was affirmed by the New Jersey Court of Errors and Appeals. The defendant, among other things, contended that it was error for the trial court to overrule the question asked of the plaintiff on cross-examination, as follows: "Q. Well, you had purchased a note from Mr. Byrnes before this date, which you had found out from the party had been fraudulently obtained from him, had you not?" The Court of Errors and Appeals held that the overruling of this question by the trial court was proper. In the first place, even though Dr. Rice had discovered that the note which he had previously purchased from Byrnes had been fraudulently obtained, this would not have made Dr. Rice a holder in bad faith of the note in this suit. This would simply have been evidence of circumstances which should have aroused Dr. Rice's suspicions. The knowledge of circumstances arousing the holder's suspicions is not the test, but the test is whether or not the holder in acquiring the note acquired it in good faith.

In this connection we think that the New Jersey court takes the extreme position in regard to this question. In most states knowledge of suspicious circumstances is received in evidence, as evidence of bad faith but is not conclusive, although in most states bad faith is the test and not knowledge of circumstances which would arouse the suspicions of an ordinarily prudent man.

Digitized by Google

and provided that the bank should not be responsible in default of such notice, and that "in all cases a payment upon presentation of a deposit book shall be a discharge to the company for the amount so paid," and since the defendant in error did not give notice of his loss prior to the payment, the bank is therefore discharged. Upon the assumption that the bank acted in good faith and in the exercise of due care, this argument may be valid, otherwise it is not sound. If the bank may negligently or through bad motives pay to a thief who has possession of the bank book, because the owner has not given notice of a loss of which he is not then aware and of which he does not become aware for months afterwards, or if the bank may so pay in any case to a person who is not lawfully entitled to receive payment, then the depositor has contracted away his right to protection in any case and the responsibility of the bank for good faith and reasonable care, which the law has imposed for reasons of public policy, is entirely futile. Under the by-law which is the contract in this case, "payment upon presentation of a deposit book could only be made to the depositor in person or to some person designated by his written order. It was not paid to him in person nor to any person designated by him. It was paid upon a forged order; and, if not paid by the bank at its own peril (Ladd v. Augusta Savings Bank, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288), it was at least, as found by the jury, negligently paid to a person who had no right to the deposit. The authorities cited by counsel for plaintiff in error are not applicable to the present case, because all of them, as we read them, are cases in which the bank was not negligent; and one of them, Schoenwald v. Metropolitan Savings Bank, 57 N. Y. 418, has been distinguished several times, and so limited to the facts of that case that it cannot be regarded as of much value as an authority. Allen v. Williamsburg Savings Bank, 69 N. Y. 314; Smith v. Brooklyn Savings Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653; Kummel v. Germania Savings Bank, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786.

The judgment is affirmed.

Bills and Notes: Bona Fides: Test: Not Knowledge of Suspicious Circumstances.

The holder, Herbert A. Rice, sued the maker, R. C. Barrington, upon the illustrated promissory note. The trial court rendered a judgment in favor of the plaintiff and the defendant appealed, alleging as error the overruling of a question asked the plaintiff on cross-examination. The question was to the effect that the plaintiff had acquired from Mr. Byrnes another note which had been fraudulently obtained from the maker. The Court of Errors and Appeals of New Jersey, which is the highest court in that State, held that the overruling of the question by the trial court was correct. Even though the plaintiff had answered this question to the effect that he had acquired a note previously from the same party, and had discovered that the note

Digitized by Google

had been fraudulently obtained from the maker, this would not necessarily have implied bad faith, but merely been proof of circumstances which should have aroused the plaintiff's suspicions. The test is not knowledge of circumstances which would naturally arouse the holder's suspicions, but bad faith must be proved. The holder is an innocent holder unless it can be shown that in acquiring the note he acted in bad faith.

The court said in part:

"On cross-examination the plaintiff was asked: 'Q. Well, you had purchased a note from Mr. Byrnes before this date, which you had found out from the party had been fraudulently obtained from him, had you not?' This question was, upon objection, overruled. The overruling of this question is the first ground assigned for error. The ruling of the trial court was correct, and may be supported upon any of several grounds. The most comprehensive ground for sustaining the ruling is that the fact that Rice had found out that a note he had previously purchased from Byrnes had been fraudulently obtained was at most a suspicious circumstance as regards the note in suit; and that the fifty-seventh section of the Negotiable Instruments Act of 1902 (P. L., p. 593), read in connection with the decisions of our courts, establishes the rule that proof of circumstances calculated merely to arouse suspicion will not defeat recovery on a negotiable note taken for value before maturity. Bad faith — i. e., fraud, not merely suspicious circumstances — must be brought home to a holder for value whose rights accrued before maturity in order to defeat his recovery on a negotiable note upon the ground of fraud in its inception or between the parties to it. Hamilton v. Vought, 34 N. J. L. 187; Read v. Abbott, 45 N. J. 303; Aldrich v. Peckham (N. J.), 68 Atl. 345, and the cases there cited."

See Decision No. 1103.

ARND v. HECKERT.

(Court of Appeals of Maryland. June 24, 1908.)

70 Atl. 416.

BILLS AND NOTES — QUESTIONS FOR JURY — BONA FIDE PURCHASER — FACTS CONSTITUTING HOLDER IN DUE COURSE.

1. In an action on a note, whether plaintiff was a bona fide purchaser held, under the evidence, for the jury.

2. An instruction that if defendant signed the bill in question, and if plaintiff became the holder of the instrument in due course, the jury should find for plaintiff, was properly refused, since the facts constituting a holder in course is a question of law, and should be left to the jury.

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by William Arnd against John H. Heckert. From a judgment for defendant, plaintiff appeals. Affirmed.

Digitized by Google

The prayers offered by plaintiff were as follows:

"(1) The plaintiff prays the court to instruct the jury that there is no evidence in this case legally sufficient to prove that plaintiff took or purchased the single bill offered in evidence with knowledge of any fraud in its obtention, or of any failure of consideration therein.

"(2) The plaintiff further prays the court to instruct the jury that if they find from the evidence that defendant signed the single bill offered in evidence, and shall find that plaintiff became the holder of said instrument in due course, then they must find for the plaintiff, even though they further find that said instrument was obtained from defendant by fraud and misrepresentations of third parties.

"(3) The plaintiff further prays the court to instruct the jury that if they find from the evidence in the cause that defendant signed the single bill sued on in this case, and shall further find that same was passed to the plaintiff for a valuable consideration before maturity, and shall further find that plaintiff purchased said single bill in good faith without notice of any fraud in its obtention or of any failure of consideration therein, then their verdict must be for the plaintiff.

"(4) The plaintiff further prays the court to instruct the jury that if they find from the evidence in the cause that the plaintiff purchased the single bill sued on for value, in good faith and before maturity, with no other knowledge that the single bill furnished on its face, then they must find that the plaintiff was a bona fide holder of said single bill, and no knowledge of fraud or want of consideration in the giving of said single bill subsequently acquired by him can affect his title as a bona fide holder for value.

"(5) The plaintiff further prays the court to instruct the jury that there is no evidence in this case legally sufficient to prove that the plaintiff took or purchased the single bill offered in evidence with knowledge of any fraud in its obtention or of any failure of consideration therein, and their verdict must be for the plaintiff."

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, and WORTHINGTON, JJ.

J. W. Scott Cochrane, for appellant. Robert H. Gordon, for appellee.

PEARCE, J. This is an action brought by the appellant against the appellee upon the following instrument of writing: "May 4th, 1906. Allegany County, Maryland. $100.00. Three months after date I promise and bind J. H. Heckert, heirs, executors, etc., to pay to R. B. Parks or order one hundred dollars for value received, bearing interest from date, at the rate of 6 per cent. per annum, and hereby waive the benefit of the homestead exemption, or any other law, that is now or may hereafter be enforced to prevent the collection of the same, and further agree to pay all attorney's fees for collecting, if collected by suit. Witness ——— hand and seal this 18th day of April, 1906. P. O. Pinto, Md. J. H. Heckert. [Seal.] Witness: E. C. Heckert. [Seal.]" Under the Negotiable Instruments Act (Code Pub. Gen. Laws 1904, art. 13, § 25), the addition of a seal to the maker's signature does not affect the negotiable character of this obligation, which was indorsed in blank by R. B. Parks and subsequently passed into the hands of the appellant. The declaration set

Digitized by Google

out the obligation in full, and alleged that it was executed by Heckert and delivered by him to Parks, "and that the said R. B. Parks indorsed said bill obligatory, and the same was passed to plaintiff, who is the holder thereof," and that no part of the money secured thereby had been paid. The suit was brought in July, 1907. The defendant pleaded never indebted as alleged; never promised as alleged; and also that the obligation is a false and fraudulent paper, and that the plaintiff took it well knowing it to have been obtained by fraud, and that it was not a good and valid obligation at the time he took the same. Issues were duly joined, and at the trial the plaintiff offered evidence tending to prove the due execution of the instrument, and that the services of the plaintiff's attorney in the case were worth $25, and then offered the instrument in evidence, and rested.

The defendant then proved by himself and his son that at the time he signed the paper two men representing themselves to be R. B. Parks, the payee therein, and William Barker, came to him, claiming to be agents of the Franklin Insurance Company of St. Louis, Mo., and promised to get him a 10-year policy in that company, if he would sign a note for $100 and that the policy would be delivered in about ten days, but that the company would not insure the barn unless a lightning rod was put up, and that he then paid them ten dollars in cash to put up a lightning rod eighty-five feet long, which they did within three-quarters of an hour, and, as soon as the paper was signed, they hurried away; that he never received any policy of insurance, and was unable to ascertain anything about the insurance company named; and that he had never seen or heard anything of Parks or Barker, except that the note was sent on for collection. The defendant also proved by Mr. D. Lindley Sloan, an attorney, that during the term of court in April, 1906, a man claiming to be William Barker, and to be from Council Bluffs, Iowa, came to him wishing him to identify him, and that immediately after this he heard the sheriff was looking for William Barker. The plaintiff's own evidence, taken under a commission in Council Bluffs, Iowa, was offered in rebuttal. It appears therefrom that he is a resident of that city, and engaged in the real estate and loan business; that he purchased the note in question May 4, 1906, at Council Bluffs, for ninety dollars, and he testified in chief that he had no knowledge but what the note was a bona fide obligation given for a valuable consideration, and had no cause to believe there was or would be any defense thereto. On cross-examination he said that at the same time he purchased this note he purchased a note of S. C. Morgan and one of Henry North, all from William Barker, paying for all in cash and discounting each note ten dollars; that he knew nothing of any of the makers of these notes, except that Barker said they were responsible men; that he did not know R. B. Parks at all, had never seen him, did not know where he lived, or anything about his financial responsibility. Upon the return of this commission it was by order of court remanded that the plaintiff might answer certain additional interrogatories upon cross-examination. He then testified that in the last two or three years he had purchased from William Barker notes to the amount of $2,000 or $3,000; that he had known Barker over twenty years; that he was in the real estate business and was worth $20,000 to $25,000, city property and farms; that he traveled a good deal, but that his residence was in Council Bluffs and he

Digitized by Google

had seen him that morning; that he did not know whether Barker knew Parks, and that Barker never told him who Parks was, or what his business was, nor where he (Barker) got the note; that he did not require Barker to indorse the note, because he relied upon his representation that Heckert was good for it; that he was not loaning money to Barker on the note as collateral, and that Barker did not promise to repay him if the note was not paid; that he kept accounts in three banks, and was the president of one of these banks, but paid in cash for all the notes mentioned; that he was worth $25,000 above all liabilities in real estate, bank stocks, notes, and cash on deposit, and in his safe. He also admitted he had heard that some years ago Barker was in the lightning rod business.

The plaintiff then offered five prayers which will be set out by the reporter. The court granted the third and fourth prayers, and rejected the first, second, and fifth. No prayers were offered by the defendant, so that the single exception is to the rejection of the first, second, and fifth prayers. The two prayers granted by the court are the same which were approved by this court in Totten v. Bucy, 57 Md. 446, a case of the same character as the one now before us, and in our opinion they gave the plaintiff all the law to which he was entitled. The fraud in this case on the part of Parks and Barker is gross and transparent, and the evidence tending to prove that the plaintiff did not take the note in good faith and without notice of facts tending to show fraud in its obtention is abundant, if not overwhelming. The suspicious circumstances are too numerous and glaring to be consistent with any rational theory of the good faith and innocence of the plaintiff in this transaction. Without enumerating them all, we may mention the absolute want of knowledge of the financial worth of the maker 1,000 miles from the plaintiff in another State; the absolute want of knowledge of who Parks was or what was his worth; the failure to present the note in time to hold Parks as indorser; the failure to require the indorsement of Barker; the heavy discount charged; the neglect to have Barker testify as to the facts attending the obtaining of the note, though the plaintiff had seen him the same morning his own testimony was given; his confession that he had heard Barker had been engaged in the lightning rod business, which, to an ordinarily prudent and intelligent man, has almost come to be a badge of fraud, at least as to these peripatetic artists in that line, and the extent to which he dealt in securities of this description. It is impossible to believe that a shrewd business man, and a bank president of any experience, could have engaged in good faith in such transactions as this, and on the scale shown by his own testimony. The inference is almost irresistible that there was some secret undisclosed connection between Parks, Barker, and the plaintiff, through which he participated in the fruits of their fraud. In Williams v. Huntington, 68 Md. 598, 13 Atl. 337, 6 Am. St. Rep. 477, the court in commenting upon the duty of the plaintiff in such a case to establish by proof that he was a bona fide holder without knowledge or notice of any infirmity in its origin or transfer used this language: "In discharge of the burden thus cast upon him he offered his own testimony, and none other. Its credibility was wholly for the jury to determine. They were at liberty to disregard it altogether, if in their judgment it was intrinsically improbable, or if it was stamped with, or inherently

Digitized by Google

furnished, indications of its unreliability." This language is especially applicable to the present case. No court could, in the face of all the facts here in evidence, have granted the first prayer which sought to take the defense of fraud from the jury, and it was defective, moreover, in not including notice as well as actual knowledge of fraud in the obtention of the note. Griffith v. Shipley, 74 Md. 591, 22 Atl. 1107, 14 L. R. A. 405; Valley Savings Bank v. Mercer, 97 Md. 478, 55 Atl. 435.

The second prayer was properly rejected. It submitted to the jury a question of law in permitting them to determine what facts constitute "holder in course." The third prayer, which was granted, correctly and clearly instructed the jury upon that question. The fifth prayer was properly rejected for the same reasons given as to the first prayer. In such cases it is the duty of the court to hold those who deal in securities obtained as these were to a rigid requirement as to the proof of absolute good faith in the transaction, and to guard juries against any misleading phraseology in the instructions, as far as possible.

Judgment affirmed, with costs to the appellee above and below.

Bills and Notes: Non-negotiable Note.

The maker of the illustrated promissory note, J. B. Daigle, executed the same in favor of Hulda Rieck, in consideration of the purchase of a hotel. Hulda Rieck transferred the note by indorsement to her stepson, Henry Rieck. The answer sets forth that the plaintiff, Henry Rieck, is not an innocent holder for value, and that the consideration for the note failed. It was proved at the trial that the hotel was purchased for the sum of $900, the defendant agreeing to pay Hulda Rieck $600 and to pay one Fannie M. Hyde $300, the said Fannie M. Hyde being the person from whom Hulda Rieck had purchased the hotel. It was also proved that at the time of the execution of this note Hulda Rieck and J. B. Daigle had entered into a contract by which she and her husband agreed to protect J. B. Daigle in the quiet and peaceable possession of this property, as against any attempt at possession by Fannie M. Hyde, by reason of the disputed claim of $100 between Fannie M. Hyde and Hulda Rieck. It was also shown that the said Daigle had paid Hulda Rieck $500 and Fannie M. Hyde $400, consequently it was his contention that this note had been paid. Judgment was rendered in Daigle's favor, but was reversed on appeal. Both courts, however, held that this was not a negotiable instrument for the reason that the note contains a provision that it is subject to conditions of hotel purchase contract of even date herewith. But the appeal court sent the case back for a new trial for the reason that there had been no evidence to show that Hyde had any right to recover this extra $100 from Daigle, and in the absence of such proof Daigle had no right of set-off against the plaintiff in this action.

Digitized by Google

Bills and Notes: Non-negotiable Note: Negotiable Instruments Law.

$100.00 Devils Lake, N. Dak., Mar. 24, 1898.

On or before the first day of December, 1902, for value received I promise to pay to Hulda Rieck or order one hundred ($100.00) dollars at the office of Albert M. Powell, Investment Banker, Devils Lake, N. Dak., with interest at the rate of seven per cent. per annum, payable annually, from date. This note subject to conditions of hotel purchase contract of even date herewith.

J B Daigle

Digitized by Google

Pay to the order of
Henry Rieck
Hulda Rieck
Henry Rieck

This note was held to be non-negotiable for the reason that it contains a provision which reads as follows: "This note subject to conditions of hotel purchase contract of even date herewith." The Negotiable Instruments Law provides:

"Sec. 20. An instrument to be negotiable must conform to the following requirements:

"2. Must contain an unconditional promise or order to pay a sum certain in money."

Where a note is subject to the conditions of a contract it is not an unconditional promise or order to pay a certain sum in money, and therefore is not negotiable. One of the elements of negotiability is that a negotiable instrumtnt may be transferred, if it is transferred in due course and before maturity, to an innocent holder and the defenses, which might be set up against the payee by the maker, cannot be set up against this bona fide purchaser. In the case, however, of an instrument which is not negotiable, the maker of the note has the same defenses against a subsequent purchaser which he had against the original payee. In this case the said Daigle, if he could prove the contents of his answer, had a valid defense against the payee, Hulda Rieck. If this note had been a negotiable note, this defense would not have been availing against an innocent indorsee. The note, however, not being an unconditional promise or order to pay money, is non-negotiable, and consequently any defense which the maker had against the payee may be set up against the bona fide holder.

Digitized by Google

The court said in part:

"It is therefore apparent that the note is non-negotiable, and consequently is subject, in plaintiff's hands, to such defenses, when properly pleaded, as may exist. Plaintiff's contention that the same is negotiable is without merit, and the authorities cited by him are, we think, clearly distinguishable from the case at bar on the facts. Without attempting an analysis of the numerous authorities cited, which would serve no good purpose, we will proceed to a consideration of the other questions involved. There are twenty-four alleged errors assigned in appellant's brief, but we are not required to notice them, except in a general way. The plea of payment was not supported by the proof, but the defense sought to be established was that, in the purchase of the hotel property, Hulda Rieck falsely represented that but $300 was at that time due Hyde from her, on the contract for deed to said property from Hyde to her, and that in fact there was a balance thus due of $400. Testimony was also introduced, over plaintiff's objection, tending to show an oral agreement to the effect that if defendant was required to pay the $100 in dispute between Hyde and Hulda Rieck the note in suit should be cancelled and surrendered to him. We think this testimony was improperly received. Such oral agreement is clearly at variance with the written contract relating to the same subject-matter, entered into a day or two after such oral negotiation took place, and hence the written contract must be held to have superseded such oral negotiations. Proof of such oral agreement was therefore clearly incompetent. Under the clause of the written contract above quoted Hulda and John Rieck, her husband, agree to protect defendant in the quiet and peaceable possession of the property sold, as against any claims asserted by Hyde by reason of the disputed item of $100. If defendant can show a breach of such contract, then, no doubt, the damage resulting to him therefrom would constitute a proper set-off in his favor, as against the note in suit, but he wholly failed to establish such defense by any competent evidence. There is not a scintilla of evidence in the record tending to show that Hyde had any legal right to recover this disputed item of $100; and, in the absence of such proof, no right of set-off was shown, nor, for the same reason, was any defense shown under the oral agreement aforesaid, even conceding that such agreement was not merged in the subsequent written contract. The rulings of the trial court, as well as the instructions complained of, were therefore erroneous, and necessitate a new trial. Judgment non obstante is asked for, but this would not be proper, as upon a new trial defendant may be able to supply the defect in his proof. Welch v. N. P. R. R. Co., 14 N. D. 19, 103 N. W. 396."

See Decision No. 1104.

Bills and Notes: Negotiable Instruments Law: Release of Indorser on Forged Instrument.

It developed at the trial of this action that a man by the name of Owen had indorsed a note to the order of the plaintiff, the maker's signature on which note had been forged and Owen was subsequently

Digitized by Google

indicted for having uttered the forged note. The defendant, George H. Law, made a note payable to the order of Owen, which Owen also indorsed to the order of Stephen Jennings, the plaintiff, for the purpose of helping Owen out of his difficulty. Owen testified that the plaintiff then delivered the first note back to him, which was the note which was claimed to have been forged, and Owen destroyed it. At the trial of the criminal case Owen testified that he had no knowledge that the maker's signature to the first note had been forged and that he had indorsed it to the order of the plaintiff in good faith. Of course the defendant, George H. Law, executed the note in suit for the accommodation of Owen, and Owen transferred it to the plaintiff, to take up the former note and Owen was liable on the first note as an indorser. He was liable whether or not the first note was a forgery and even though he had uttered it, knowing it to be a forgery, he would have been liable. Prima facie the plaintiff is entitled to recover under the Negotiable Instruments Law for the reason that under the Negotiable Instruments Law every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon is deemed a party thereto for value and 'value' is any consideration sufficient to support a simple contract, and an antecedent or pre-existing debt constitutes value, and where value has at any time been given for the instrument the holder is deemed a holder for value in respect to all parties who became such prior to that time. The defendant set up the defense that the consideration for this note was illegal in that it was given to quash the criminal case pending against Owen; in other words, that the consideration was the compounding of a felony. The Appellate Court, however, held that there was a civil liability on the part of Owen on the first note as indorser, and furthermore there was no evidence to support any contention that there was an agreement to quash the criminal case. The plaintiff's exception to the judgment of the trial court in favor of the defendant was sustained.

The court said in part:

"The defendant has not argued against any of the propositions that have been stated, but rests his defense solely upon the contention that the plaintiff had agreed, if Owen would get the defendant to give the note sued on, to accept the same, and to quash the criminal case pending against Owen, and that it was for this purpose that the defendant made the note, and so that the transaction was forbidden as an agreement for the compounding of a felony. He says in his brief: 'The transaction was one forbidden by law, and the evidence coming to the court from the plaintiff, the court had a right to receive it and instruct the jury to find for the defendant if they believed it.' Cardoze v. Swift, 113 Mass. 250, and cases cited. But the difficulty with this contention is that we have no evidence to support it. There was no evidence of any agreement of the plaintiff to quash the criminal case,

Digitized by Google

$45.00 Trenton, Mo., Oct. 7, 1895.

One year after date, I promise to pay to the order of O. J. Starr, forty-five dollars, for value received with interest at the rate of eight per cent. per annum from date, until paid, and if not paid annually the same to become a part of the principal and bear the same rate of interest as the principal debt. Payable at the First National Bank, Trenton, Mo.

C. Millard.

Digitized by Google

O. J. Starr

John Vogel, the holder of this note, sued the indorser and payee, O. J. Starr. On the trial O. J. Starr successfully defended the suit on the ground that he had not received a proper notice of dishonor. The note is payable at the First National Bank at Trenton, Mo., and this bank having gone into liquidation at the time of the maturity of the note, the plaintiff deposited the same in the Trenton National Bank for collection and the note was given to a notary to protest on the last day of grace. The notary made several inquiries in regard to the residence of the said Starr and was informed that he resided in Spickards, Mo. On the trial it developed that Starr was a farmer, living between Spickards and Tindall, and that he lived one mile nearer Spickards than Tindall and that Spickards was a larger town than Tindall, but Starr received his mail at Tindall and therefore did not receive the notice of protest which had been mailed to him for some three (3) months subsequently. There was no evidence of bad faith on the part of the notary who protested the note, or upon the part of the plaintiff. The indorser must be notified of the dishonor of the note by the maker, in order to be held liable. Where the indorser's post-office address is not known it is the duty of the holder to make inquiries and to address the notice to the post office nearest the residence of the indorser; but the holder must act in good faith and if he actually learns the post-office address of the indorser he must mail the notice there. The question is largely one whether or not the party who protested the note exercised good faith and used reasonable diligence in the performance of his duty.

Digitized by Google

or of any other unlawful agreement by him. He had a good claim against Owen on the note, and had a perfect right to settle it. Indeed, it appears incidentally that Owen was afterwards tried on the criminal charge, though it does not appear whether he was convicted or acquitted. If, as we infer from the argument of the defendant, this was the only ground upon which he rested his defense, we are of opinion that the plaintiff's exceptions must be sustained."

See Decision No. 1105.

Bills and Notes: Notice of Dishonor: Sufficiency.

The plaintiff, John Vogel, is the holder of a note similar to the illustrated one, having purchased the same from the defendant, O. J. Starr, who is the payee named in the note and who indorsed the same to the plaintiff. The defense interposed by the defendant was that he was not given a proper notice of the dishonor of the note. It will be noted that the note is payable at the First National Bank, Trenton, Mo. This bank had gone out of existence at the time of the maturity of the note. The plaintiff deposited the note with the Trenton National Bank and upon the last day of grace, October 10, 1896, the Trenton National Bank gave the same to a notary to protest. Millard, the maker, had removed from Trenton to Wisconsin. The best information concerning Starr's address which the notary could get was that his address was Spickards, Mo. It subsequently transpired that Starr was the tenant of a farm, which was nearer Spickards than any other place, but that he received his mail at Tindall. Both towns were small towns, but Spickards was the larger town. The notary made inquiries of several people in Trenton, Mo., and was informed that Starr lived at Tindall and he sent the notice to Starr at Tindall. Starr did not recieve it until three (3) months after it was mailed, and when he was sued upon the note, he defended on the ground that he had not received notice of its dishonor. Judgment was rendered in his favor, and the plaintiff appealed. The case was reversed on appeal.

The court said in part:

"While it is true that the holder of commercial paper for collection must be regarded as a separate and independent holder for the purposes of presentment, demand, protest, and notice of dishonor (Renshaw v. Triplett, 23 Mo. 213; Griffith v. Assmann, 48 Mo. 66; Ivory v. Bank, 36 Mo. 475, 88 Am. Dec. 150; Bank v. Briedow, 31 Mo. 523; Young v. Hudson, 99 Mo. 102, 12 S. E. 632), we are willing to concede for argument that it was the duty of plaintiff to communicate to his collection agent the facts in his knowledge relating to the post-office address of the indorser, but we do not sanction the contention that he was charged by law with the further duty either to notify the indorser personally of the dishonor of the note or to make inquiries

Digitized by Google

in the neighborhood to ascertain the place where the indorser received his mail. The note, by its terms, being payable at Trenton, it was very natural that plaintiff should employ an agent at that place to look after its collection, and that he should rely on his agent to take the necessary steps to hold the indorser. We are going far enough when we assume that it was his duty to communicate to his agent the knowledge of facts material to the subject of the employment he had or might acquire during the course of the employment. It was not his duty to perform personally the very duties he had delegated to his agent. When a person employs an agent to do a thing he should not be held to be remiss for relying on his agent and only may be held liable for the negligent or wrongful acts of the agent in the performance of the delegated duty under the principle that what one does by the hand of another he does himself. Imputing to the collection agent and the notary knowledge of the facts known to plaintiff, our chief concern is with the question of whether the notary exercised reasonable diligence in the giving of notice to the indorser. Since we find in the record no controversy over material facts, the question is one of law, not of fact. As early as the case of Linville v. Welch, 29 Mo. 203, it was decided by the Supreme Court that what is due diligence in giving notice of dishonor of a bill of exchange is a question of law when the facts are undisputed, and, when they are in dispute, the court should give hypothetical instructions, leaving the facts to be determined by the jury. Sanderson's Adm'r v. Reinstadler, 31 Mo. 483; Fugitt v. Nixon, 44 Mo. 295. Considering the case, then, from the standpoint presented by the facts known to plaintiff, knowledge of which we ascribe to the notary, and by the facts acquired by the notary from his own inquiries, and treating the question of law, we next turn to consider the principles and rules by which the holder of a bill of exchange must be controlled in giving to an indorser notice of dishonor. The liability of the indorser is conditioned upon the existence of two facts, viz: (1) that the maker has made default in the payment of the bill at maturity; (2) that due notice of that fact be given the indorser. As to what will constitute sufficient notice it is well settled that personal service of the notice is not required. Constructive service will suffice if reasonable diligence is exercised to make it in the manner best adapted to convey actual notice. 'Where the party to be served is a resident of the city or town where the protest is made, the course required is to give him personal notice or to leave it at his dwelling or place of business. But, if he lives in the country, then a notice by mail to his post office will be sufficient.' Barrett v. Evans, 28 Mo. 331; Sanderson's Adm'r v. Reinstadler, supra. When the indorser lives in the country and his post-office address is not known to the holder, it is the duty of the latter to make reasonable inquiries in the town or city where the bill is payable, and, in default of more specific information, to address the notice to the post office nearest the residence of the indorser. But the holder is not justified, in all cases, in sending the notice to the nearest post office. He must act in good faith always and with reasonable diligence to learn the place where the indorser receives his mail, and, learning it, must send the notice there, regardless of whether it be the nearest post office. With these principles before us we do not hesitate to declare as a matter of law that the notary, whose good faith is not

Digitized by Google

questioned, exercised reasonable diligence and acted on the information he received in a way which would have commended itself to any reasonably careful and prudent person in his situation. He made inquiries of several persons, all of whom appeared to possess some information on the subject and all expressed the belief that Spickards was the proper address of the indorser. Taking these opinions in connection with the fact that Spickards was the nearest town to the indorser's farm and was a much larger place than Tindall, we think any person in the situation of the notary would have come to the conclusion, as he did, that the notice should be sent there. Finding, as we do, that the notary acted properly, it is immaterial that the indorser failed to receive the notice within a reasonable time. That was his misfortune, for which, in a sense, he was responsible. He was justified in standing strictly on his right to legal notice, but presumably he knew of the fact of the maturing of the note, and from all the circumstances must have anticipated that notice of dishonor likely would be addressed to him at Spickards. The notice was sufficient."

See Decision No. 1106.

Bills and Notes: Checks: Delay in Presentment for Payment.

Harry Kramer sued Floyd Grant and Grant set up the defense of payment. It was brought out at the trial that on January 27, 1907, Grant mailed a check for the amount of the debt to the plaintiff's attorney, which check was received January 28th, and indorsed by a clerk in the plaintiff's attorney's office. The name of the plaintiff, who was the payee of the check, was indorsed upon the check by this clerk and the clerk put his own name upon the check and the attorney for the plaintiff, upon receiving it, transferred it to one Feldman, who also indorsed it. The Mechanics' and Traders' Bank, upon which the check was drawn, closed its doors on January 30, 1908, and the check had not been presented to the bank for payment prior to that time. The Municipal Court rendered a judgment in favor of the plaintiff, but the Appellate Term reversed the judgment of the Municipal Court and held that the plaintiff should have deposited the check for collection within twenty-four hours after it was received. If he desired to negotiate the check, he did so at his own risk. Where a check is given in payment of a debt, the person receiving the same at his own risk delays presenting the same for payment. The check should be presented for payment within a reasonable time after it is received and it is usually held where the party reside in the same community that twenty-four hours is a reasonable time.

The court said in part:

"As between the plaintiffs and the defendant, the loss resulting from the failure of the bank should fall upon the former. Their agent received the check, and at that time and until the bank closed its doors

Digitized by Google

the account of the defendant in the bank was ample to meet the check. The agent of the plaintiffs did not deliver the check to his principals or deposit it at once for collection. On the contract, it is evident from the indorsements upon the check that the agent negotiated it. The check, when originally delivered, was merely a provisional payment of the amount due; but when the authorized agent of the plaintiffs indorsed the plaintiff's name upon it, and their attorney in turn indorsed and delivered it to some one other than the plaintiffs, that which was given as provisional payment became absolute, and the defendant was relieved of further obligation. It is well settled that delay in the presentment of a check will relieve the drawer from liability, where he has been injured by the delay. 7 Cyc. 977; Murphy v. Levy, 23 Misc. Rep. 147, 50 N. Y. Supp. 682; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43. In appropriating and negotiating the check, instead of depositing it for collection within twenty-four hours after it was received, the plaintiffs' agent acted at the risk of his principals, rather than at the risk of the drawer of the check. Judgment appealed from is reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur."

See Decision No. 1107.

Bills and Notes: Forged Checks: "Fictitious" Payee: Bank's Liability to Depositor.

The estate of Kate M. Wallace had an account with the Trust Company of America, the plaintiff in this action, and this suit involves four checks for $500 each, drawn upon the Trust Company of America by the "Estate of Kate M. Wallace. Arthur B. Wallace, Adm'r." It appeared that the signature above was forged. The checks were made payable to distributees of the estate of Kate M. Wallace. The checks were countersigned by the United States Fidelity & Guaranty Company. The Trust Company of America accepted the checks and the checks were deposited with the Hamilton Bank of New York city, the defendant in the action. Upon all four checks the name of the payee was also forged and one of the checks was deposited with the Hamilton Bank by M. F. Kerby, one of the Hamilton Bank's depositors, and it had the indorsement of Harvey J. Conkey, M. F. Kerby and A. Edward Fisher, in addition to the forged indorsement of the payee. Another of the checks, although it bore a different date, practically had the same history. The other two checks, bearing different dates, were deposited by Hrvey J. Conkey, also a depositor of the Hamilton Bank, and these two latter checks had only the indorsements of Harvey J. Conkey in addition to the forged indorsement of the payee on each of the two checks. Of course the money credited on two of the checks to the account of M. F. Kerby and on the other two to the account of Harvey J. Conkey was drawn out by the two depositors. The Trust Company of America, upon discovering the

Digitized by Google

forgery, immediately notified the Hamilton Bank, and the case was submitted to the court upon an agreed statement of facts. The court held that the Trust Company of America could not recover of the Hamilton Bank the amount that it had paid out upon these checks.

The court said in part:

"The general rule is that payments made under a mistake of fact may be recovered, although negligently made; but it is also settled that, if the drawee of a bill of exchange to which the drawer's name has been forged accepts or pays the same, he can neither repudiate the acceptance nor recover the money paid, since he is bound to know the drawer's signature. Price v. Neal, 3 Burrows, 1354; Bank of United States v. Bank of Georgia, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; National Park Bank v. Ninth National Bank, 46 N. Y. 77; Goddard v. The Merchants Bank, 4 N. Y. 147. It is also settled that, where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one who holds under such forged indorsements may be recovered. Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615; Canal Bank v. Bank of Albany. 1 Hill, 287. Therefore, if all the indorsements on the checks in question had been genuine the plaintiff could not recover; but if the maker's signature had been genuine, and only the indorsements or any of them forged, it could recover. Having paid the checks, the plaintiff cannot now be heard to say that the maker's signatures were not genuine, or recover on the ground that the same were forged, and by reason of that fact it is suggested that the rights of the parties are precisely the same as though the drawer's signatures were genuine, and since the defendant never obtained good title to them, on account of the forged indorsements of the payees, the plaintiff is entitled to recover. There are authorities to support this contention. First Nat. Bank v. Northwestern Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247; McCall v. Croning, 3 La. Ann. 409, 48 Am. Dec 454. But it does not necessarily follow, because the checks were not indorsed by the persons whose names appeared on them as payees, that the defendant, which received them in good faith and paid value therefor, can be compelled to repay their amount to the plaintiff. A leading authority on the subject is Bank of England v. Vagliano Bros., L. R. (1891) App. Cas. 107, which reversed Vagliano v. Bank of England, 23 Q. B. D. 243, and 22 Q. B. D. 103. This authority has been frequently cited and is directly in point. There Vagliano Bros. were foreign bankers doing a large business in various parts of the world. One of their clerks, Glyka, forged a large number of bills of exchange purporting to be drawn on the firm by one of its foreign correspondents, payable to another well-known firm. He also forged letters of advice to accompany them and caused them to be presented, the same as genuine bills, to Vagliano Bros. in the regular course of business. Vagliano Bros., deceived by the cleverness of the forgeries, accepted from time to time bills aggregating over $350,000, which they directed the Bank of England, their general banker, to pay when presented. After bills had been accepted, Glyka would obtain possession of them, indorse thereon the name of the payee, and collect the money from the bank, which charged the amounts so paid to the account of

Digitized by Google

Vagliano Bros. The latter, on discovering the forgeries, sued the bank to recover the amounts so paid out on the forged bills. The House of Lords held, reversing the decisions of the lower courts, that this amount could not be recovered. The decision is placed upon the ground that 'since Glyka, although he inserted in the forged bills as payee the name of a well-known firm, knew that such firm had no interest in the bills and never intended that it should, the payee was fictitious,' and under the statute providing that 'Where he payee is a ficitious or non-existing person the bill may be treated as payable to bearer' (Bills of Exchange Act 1882, § 7, subsec. 3), the bills of exchange were, in legal effect, payable to bearer, and the bank obtained good title, regardless of the indorsements. Some doubt was expressed in the Bank of England case as to whether the statute warranted such construction, since the effect was to make the fictitiousness of the payee depend upon the maker's intention; but under our own statute no such question can be raised. The Negotiable Instruments Law provides (Laws 1897, p. 724, c. 612, § 28):

"'The instrument is payable to bearer: . . . (3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.' The correctness of the decision in First National Bank v. Northwestern Bank, supra, may well be questioned, since the decision of the lower court, which was reversed by the House of Lords, in the Bank of England case, was cited at length and relied upon. Whether this be so or not, the decisions in our State are entirely in harmony with the views expressed by the House of Lords. Thus, in Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310, a partner drew a bill of exchange in the name of the partnership, payable to one Truman Billings and forged thereon the indorsement of the latter. The bill subsequently came into the hands of the defendant bank, and the plaintiff, upon whom it was drawn, accepted and paid it. It was held that the plaintiff, on discovering the forgery, could not recover the amount paid from the defendant, since the bill was in effect payable to bearer, and defendant had good title. Mr. Justice Bronson, who delivered the opinion of the court, distinguished the case of Canal Bank v. Bank of Albany, supra, and said:

"'As the payee has no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it a bill payable to bearer. . . . In legal effect, though not in form, the bill is payable to bearer. . . . The plaintiff probably accepted and paid the bill under the mistaken assumption that the indorsement was genuine; but he was not mistaken about the main fact which he was concerned to know, which was that the holder was the owner of the bill."

"And in Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, the cashier of the National Bank of Sumter, S. C., drew checks in the name of the bank, inserting as payees the names of customers of the bank, whose indorsements he forged. The checks thus drawn were sent to various firms in New York and subsequently came into the hands of the de-

Digitized by Google

fendant, which received them in good faith and charged them to the account of the Sumter Bank. The receiver of the Sumter Bank thereafter brought an action to recover the amount of these checks, and it was held that the same could not be maintained, since in legal effect the payees were fictitious and the checks payable to bearer, and for that reason the defendant obtained good title. The court, Mr. Justice Gray delivering the opinion, said: 'The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys, by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter Bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were known persons? That the intention was to treat them as being of fictitious persons is manifest. . . . The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name.' Under the negotiable instruments law and the cases cited, I am of the opinion the checks in question, as betwen the plaintiff and defendant, were payable to bearer. It does not appear who forged the maker's signatures, but the subsequent history of the checks does not leave it open to doubt as that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the Bank of England and the Phillips Cases, in order to accomplish the fraud more easily, the names inserted as payees were those of persons to whom checks might naturally be made. Whether indorsing the names of the payees upon the checks was technically forgery or not it is unnecessary to consider. It has been convenient to thus describe them. Despite these forged indorsements, then, the defendant acquired good title, since in legal effect the checks were payable to bearer. Plaintiff, having paid them to a holder in due course, cannot recover upon the ground that the payees' signatures were forged. Nor is this view at all in conflict with Shipman v. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821. There, the plaintiff's firm signed a large number of checks relying on the false statement of an employee; the names of the payees being in some instances fictitious and in other the names of existing persons. The employee upon whose false statements the checks were made then indorsed upon them the names of the respective payees, and the checks were thereafter paid in good faith by the bank upon which they were drawn. The court held that the plaintiff could recover from the bank the amount paid, distinguishing the Bank of England Case, and the distinction is obvious. In the former case, the member of the firm who signed the checks in the firm name believed that in every instance the payee was a real person to whom alone the check was payable, while, in the latter case, the person who wrote the maker's signature was a forger who knew that, so far as the bills of exchange were concerned, the payee was fictitious. The court expressly recognized the rule that the maker's intention was controlling, saying:

"'The maker's intention is the controlling consideration which de-

Digitized by Google

termines the character of such paper.' It is true that in many of the authorities cited the person guilty of the fraud was connected in some way with one of the parties, which may have effected the equities of the case, as was suggested in Shipman v. Bank of State of New York, supra, concerning the decision in the Bank of England Case, while here, so far as appears, the guilty party was a stranger to both plaintiff and defendant, and they are equally innocent. But that cannot change the law as to the fictitiousness of the payees, and, if it did, I am of the opinion that any equities in the present case are with the defendant. The risk of paying out money upon a forged signature of a depositor is one which a banker must assume, and, if the plaintiff had detected the forgeries when the checks were presented for payment, it would not have suffered any loss, and it is possible that the defendant would not. I am of the opinion that the plaintiff has no legal claim against the defendant, and for that reason the latter is entitled to judgment upon the merits, with costs. All concur."

See Decision No. 1108.

Banks and Banking: Payment of Check: Body Of Which Is Not in Handwriting of the Maker: Negligence.

The plaintiff is B. Vogeli, and the defendant, the First State Bank of Scott City. The plaintiff recovered judgment against the defendant and the First State Bank of Scott City appealed, and upon appeal the case was called the First State Bank of Scott City v. Vogeli. The judgment of the trial court was reversed and the case was remanded for a new trial. The cause of action involved the payment by the bank of an $1,800 check, to which the name of the plaintiff was signed, and which signature the plaintiff claimed to be a forgery. The plaintiff had on deposit in the defendant bank the sum of about $4,000, and as he was leaving for a trip away from his town, he obtained from the bank a letter of credit in the sum of $400. The check for $1,800 which was paid by the bank, was not drawn on a blank check of the defendant bank, but upon the blank of the American National Bank of Kansas City, Mo., and the plaintiff claimed that he never signed the check and the defendant was negligent in paying this check. Upon the trial he was asked if the signature was his signature and he answered that it didn't look like his signature and he never signed any check. It transpired at the trial that while the plaintiff was away on his trip he met a stranger who agreed to send him some seed wheat if he would sign his name in a book, and he did so, while standing in the street and not having on any glasses, which he generally used. The defendant bank's officers testified that the plaintiff had stated that the signature to the check was genuine, but that he did not realize what he was signing when he signed it, and the plaintiff signed a statement for the bank, in which he stated that the signature was

Digitized by Google

his genuine signature. The jury held that the bank was negligent in paying the check which was payable on the blank of another bank and in paying the check while the plaintiff was away and in excess of the plaintiff's letter of credit. They also held that the plaintiff was guilty of negligence in signing his name on a blank paper or partly filled out paper in the hands of a stranger. The Appellate Court in reversing the judgment of the trial court in favor of the plaintiff held that it was not negligence for a bank to pay a depositor's check which was not written on the blank form of a check of the bank where the depositor had his account nor was it negligence for the bank to pay a check in excess of the plaintiff's letter of credit. The Appellate Court also held that it was not negligence to pay a check, the body of which was not in the handwriting of the depositor. That all that was required of the bank was that it should know the drawer's signature. Of course if the bank had paid a check which had been materially altered, subsequent to its execution, the maker would not have been liable for the amount of the check, unless he had so negligently prepared the check, that the payee was given great latitude in changing it.

The court said in part:

"It is not negligence for a bank to pay a depositor's check written on the form of another bank. There is no invariable rule by which customers of a bank are required to use a blank check prepared by the bank, and in the ordinary course of business it is of very common occurrence to use a check of another bank, erase the name and insert that of the bank in which the depositor's account is kept. This occurs every day in all banks. Nor did the fact that the check was for an amount in excess of the $400 letter of credit tend to prove negligence or put the bank upon inquiry. The letter was given the plaintiff to establish credit with other banks or persons with whom he might have business. His account was subject to check, and he needed no letter of credit to oblige the bank to pay checks drawn by himself. Again, the fact that some days previously the bank had paid a check for $100, drawn by the plaintiff, on a regular blank of the defendant was wholly immaterial, and not sufficient to excite suspicion as to the genuineness of the check in controversy. The last circumstance found by the jury is that the check was not filled out by the plaintiff, but there was nothing unusual in this, even if the plaintiff had not been in the habit of having others fill out his checks. 'The rule requiring the bank to know the customer's handwriting was always confined to a knowledge of his signature. Neither any rule of law or the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the handwriting of the maker or drawer.' 2 Morse on Banks and Banking, § 480. The rule is stated in 2 Daniel on Negotiable Instruments, § 1654, as follows: 'But a bank is not bound to know more than the signature of the drawer of the check; for in the ordinary course of business the body of the check is as often as otherwise filled up by a clerk, and is by no means a matter of suspicion that it is not filled up

Digitized by Google

in the handwriting of the drawer. If the rule were otherwise a bank could never safely pay a check filled up in a handwriting not the drawer's, until it had inquired of the drawer whether it was properly filled up. And to require this would greatly embarrass commercial transactions.

"To the same effect, see Reddington v. Woods, 45 Cal. 406, 419, 13 Am. Rep. 190; Bank of Commerce v. Union Bank, 3 Comst. (N. Y.) 230, 234; National Park Bank v. Ninth National Bank, 55 Barb, 87, 124. If this check had been genuine, and the failure of the bank to pay it resulted in loss to the plaintiff, the bank would have been liable to him for all damages resulting therefrom, and none of the circumstances mentioned by the jury would have relieved the bank from its liability. Of course a false or fraudulent alteration in any material matter in the body of the check after signature would have constituted technical forgery, and the bank would have been liable to the plaintiff, unless by some act of negligence upon his part he furnished the opportunity for the fraud which deceived the bank, in which case he must suffer the just consequences of his own carelessness, and bear the loss. The jury found that the plaintiff was guilty of negligence in signing his name to some blank or partly filled out paper in the hands of a stranger, and it is insisted that, on the facts found, judgment should be directed for the defendant. There was no motion or request for judgment, notwithstanding the verdict, and it is unnecessary to consider the effect of this finding."

See Decision No. 1109.

Bills and Notes: Agency.

The Shelton Implement Company sued Fred and Henry Schieck on a promissory note. The defendants, the Schiecks, purchased a threshing machine of Russell & Company, of whom the Shelton Implement Company was the agent, at Shelton, Neb. The threshing machine was paid for by notes, and according to the evidence on the part of the defendants, they supposed all the notes which they gave were given to the Russell Company, and that the Shelton Implement Company, of which one Stevens was the manager, was the agent of Russell & Company. They signed the notes without reading them, supposing they were the purchase money notes for the machine and they did not know they signed this note in favor of the Shelton Implement Company. It was proved conclusively at the trial that the Shelton Implement Company were the agents of Russell & Company. Under the theory that an agent cannot represent both parties to a contract and as the plaintiff had received a commission from Russell & Company the consideration for this note failed because the consideration for this note represented the commission which was due, as alleged, from the other party to the contract, the defendants in this action. The plaintiff could not represent Russell & Company in the

Digitized by Google

sale of the machine and also the Schiecks in the purchase of the machine, therefore having received its commission from one party to the contract, it could not recover on the promissory note which represented a commission fro mthe other party to the contract. In this connection the courts are averse to allowing anybody to represent both parties to a contract unless both parties agree to it. As one judge expressed it, the courts will not place a man in a position where it is a strain upon him to be honest.

The court said in part:

"The law is settled that an agent is not entitled to a commission from both seller and buyer, unless it is so agreed and understood by all parties to the transaction. Stevens, the manager for the plaintiff, contends that plaintiff was not an agent of Russell & Co., who sold this threshing outfit, and he offered in evidence several letters received from Russell & Co.'s manager in support of this contention. In one of these letters, of date July 12, 1898, and apparently referring to another transaction, Russell & Co.'s manager says: 'You state that you think that you will be able to get such security as will insure both the amount going to us and to you for commission. We hardly see what you mean by this, unless you expect to take separate notes for commission. The way we sell goods through agents is this: The notes run to us, and the commission is payable to the agents pro rata as each note is paid. We issue the agent a certificate showing the amount of his commission in each note, this commission certificate to share in interest and expense of collection. Please make settlement with purchasers accordingly.' The secretary of a Council Bluffs company, acting for Russell & Co., testified that the plaintiff, the Shelton Implement Company, or James Stevens, acted as agent for Russell & Co., in making this sale, and that the Shelton Implement Company received three commission certificates, one for $100, one for $375, and one for $192.50, to be paid as commission from the proceeds of the purchasers' notes when collected; that the only interest in the matter which the Shelton Implement Company had was its commission interest, which was payable as the notes were collected. It is true that the record shows that defendants did not pay their notes given Russell & Co., on the purchase of this outfit, and that their notes were returned to them on their surrendering the machinery to Russell & Co.; but the fact that the Shelton Implement Company, or Stevens, who acted for it, accepted commission certificates from Russell & Co., for making the sale is ample evidence to support the finding of the court that the plaintiff was the agent of Russell & Co., and had contracted and agreed to accept from the company a commission for the sale. This being so, the note in suit is without consideration, and voidable, as an agent cannot make a valid contract where, in the same transaction, he acts as agent for both parties, unless that fact is disclosed. Levy v. Loeb, 85 N. Y. 365; Meyer v. Hanchett, 39 Wis. 419; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168. An agreement between the agent of one party and another party to pay commission on a sale of his principal's property is void. Bollman v. Loomis, 41 Conn. 581. In Porter v. Woodruff, 36 N. J. Eq. 174, the court said: 'The moment an agent ceases to be the representative solely of his employer, and

Digitized by Google

places himself in a position towards his principal where their interest may conflict, no matter how fair his conduct may be in the particular transaction, he ceases to be that which his service requires and his duty to his principal demands. In such cases the courts do not stop to inquire whether the agent has obtained an advantage, or whether his conduct is fraudulent or not, but if the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, the courts will not speculate concerning the merits of the transaction, but at once pronounce it void as against public policy.'"

See Decision No. 1110.

Bills and Notes: Undisclosed Principal: Corporations: Sale of Stock: Fraud.

James M. Elliott, Jr., brought this action against James Brady and others, who were indorsers upon four (4) promissory notes. These promissory notes were executed by the Industrial Securities Company, payable to its own order and indorsed by said company and by the indorsers, who are the defendants in this action. The defendants, in October, 1902, entered into negotiations with the plaintiff to purchase the stock of the Southern Car & Foundry Company. It was finally determined that the contract should be made with one Paine. On October 21, 1902, the plaintiff and the said Paine entered into a contract under seal, by which the plaintiff agreed to sell to Paine $600,000 worth of preferred stock and $600.000 worth of common stock of the Southern Car & Foundry Company, the stock to be paid for at par. There were other details connected with the contract and eventually under the contract $689,900 worth of the stock was delivered and paid for and the fact that this amount of the stock had been delivered and paid for was indorsed upon the contract. The Industrial Securities Company was a company formed to take over the stock of the Southern Car & Foundry Company. As part payment for said stocks the plaintiff accepted in lieu of cash, a note made by the Industrial Securities Company, payable to its own order and indorsed by it and by the defendants, for $259,900. The note was not paid at its maturity and was renewed by five (5) notes for $50,000 each, and one note for $9,900, all of which were payable and indorsed as the $259,900 note was. The $9,900 note was paid, but the other five (5) notes were not paid, and after negotiations the defendants paid $125,000, and the balance of $125,000 was extended by four (4) renewal notes, which renewal notes are the subject of this controversy. The defense relied upon by the defendants to the action on the notes is that they were imposed upon in the purchase of this stock, that the plaintiff made false and fraudulent representations as to the financial condition and assets of the Southern Car & Foundry Com-

Digitized by Google

pany, that although the contract was made by Paine, the notes were indorsed by them in reliance upon these representations made to them by the plaintiff. The trial court rendered a verdict in favor of the plaintiff and this was affirmed by the Appellate Division, and the defendants appealed to the Court of Appeals, which affirmed the verdict of the Appellate Division.

The court said in part:

"For the purpose of this appeal we will assume that the alleged false and fraudulent representations were made by the respondent, that Paine relied thereon in making the contract, and that the appellants indorsed the note of $259,900 and the first renewals thereof, believing that such representations so made by the respondent were true. The fundamental difficulty with the appellants' contention is that they are not parties to the contract as made. The contract is between the respondent and Paine. The appellants did not become bound thereby or liable to the respondent in case of failure to perform the agreements therein contained. If Paine had been damaged by said false representations he has not asserted it. If, as we assume, a fraud has been committed, Paine could repudiate the contract, and, after returning the stock, ask them to return to him the consideration paid therefore, or he could affirm the contract and bring an action upon the facts to recover damages for the injuries which he has sustained by reason of such fraud. He has not done either of these things. The only persons who can bring an action upon a written contract under seal are the parties to it or their assigns. So far as appears from the record, the only legal relation that the appellants sustain, if any, to this transaction, is as sureties for a corporation which they allege became the successor to Paine. A party, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counterclaim. It is for the principal to determine what use he will make thereof, and the surety has no control over him in this respect. Lasher v. Williamson, 55 N. Y. 619; Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Newton v. Lee, 139 N. Y. 332, 34 N. E. 905; American Guild v. Damon, 186 N. Y. 360, 78 N. E. 1081. It cannot be claimed by the appellants that the written contract was executed by Paine as their agent, and that they are the real principals, though not named in the instrument. Denike v. De Graaf, 87 Hun, 61, 33 N. Y. Supp. 1015, affirmed on opinion below, 152 N. Y. 650, 47 N. E. 1106; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Schaefer v. Henkel, 75 N. Y. 378; Kiersted v. Orange & Alexandria R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199. It further appears that all of the appellants were fully aware of the alleged fraud in January, 1903. They indorsed the several notes in suit on or about the day of their dates in March, 1903, with full knowledge of the alleged fraud. Treating the notes as evidence only of a part of the unpaid consideration for the stock, the renewal thereof with full knowledge of the fraud was an affirmance of the contract. The view we have taken of this case make it unnecessary to consider the rulings of the court upon exceptions to the receipt or exclusion of evidence upon the trial."

See Decision No. 1111.

Digitized by Google

Bills and Notes: Bona Fide Purchaser: Fraud in the Inception of Note.

This was an action upon a promissory note in which the plaintiff claimed to be a bona fide holder. Judgment was rendered for the defendants and the plaintiff appealed and the judgment was reversed. One of the errors committed by the trial court was in charging the jury that the burden was first upon the plaintiff to show that he was the owner of the note sued upon, and that he acquired the same in the ordinary course of business and before the same was due, and should the jury so find "from a careful consideration of all the evidence in this case," they would find for the plaintiff, unless they found that the note was secured by the defendant through fraud. The case was reversed for the reason that the trial judge failed to recognize the well-known principle of law that the mere possession of the note by the plaintiff raises a presumption that he is a holder in good faith and that he does not have to show that he is a bona fide holder until there has been evidence introduced on the part of defendant, showing fraud in the inception of the note.

It developed at the trial that this note was given in consideration for a horse which was warranted and the horse was not as warranted. It was also shown that the horse was to be returned to Galesburg, Ill., in case of the failure of the horse to fulfil the terms of the contract, and the plaintiff contended that as the defendants had not returned the horse they could not rescind the sale, and refuse to pay the purchase price. In this case, however, it was shown that the defendants signed the note because they believed a man by the name of Stover, whose signature was also on the note, had become a party in the purchase of the horse, and was to have an equal interest in the horse with the others, whereas, as a matter of fact, the said Stover was merely a decoy to influence the other makers to sign the note, and he was released from liability on the note subsequently and paid no part of the purchase price of the horse. Under these circumstances the court held that the defendants having discovered the fraud perpetrated upon them need not go to the expense of shipping the horse to Galesburg, but could notify the person from whom they purchased the horse that the horse was in readiness to be delivered back to him.

The court said in part:

"In giving this paragraph the court omitted to note the well-established rule that the mere possession of the note by the plaintiff raises a presumption, without other evidence, that he is a holder in good faith, and it is not until it has been shown by appropriate evidence that the instrument was procured and put in circulation by fraud that any burden is cast upon him to explain his possession, and give affirmative evidence that he acqnired title in due course of business and without notice of the fraud. Lathrop v. Donaldson, 22 Iowa,

Digitized by Google

234; Shaulis v. Buxton, 115 Iowa, 430, 88 N. W. 968. Counsel for appellee say that the instruction under consideration is not inconsistent with this rule; the burden being upon the plaintiff under the pleadings, though removable for the time being upon production of the note in evidence. But the trouble with this suggestion is that the court did not thus explain or qualify its statement. On the contrary, it told the jury that to make his case the plaintiff must first 'establish that he is now the owner of the note sued upon, that he acquired the same in the ordinary course of business and before the same was due' and, so far from telling the jury that any presumption of ownership or good faith arises in plaintiff's favor from the possession of the note, they were instructed to determine the question 'from a careful consideration of all of the evidence in the case.' This placed upon the plaintiff a burden materially greater than the law warrants. It is probably true that the correct rule can be deduced from other instructions given, but this we think cannot serve to remove or neutralize the prejudice presumably resulting from the unqualified statement in the seventh paragraph. In thus holding we do not ignore or minimize the rule approved by the great weight of authority and applied by us to McKnight v. Parsons, 113 N. W. 858, that, where the note is shown to have been tainted by fraud in its inception or fraudulently put in circulation, the burden rests upon the plaintiff to show that he acquired it innocently. The rule is also now embodied in our statute (Code Supp. 1907, §§ 3060a55, 3060a59), but until the defendant offers evidence sustaining such defense the plaintiff is under no obligation to negative it or to assume the burden of showing that he is the holder in good faith and without notice. The further point is made that the matters complained of did not amount to a fraud, but to this we cannot agree. In our judgment the answer states a good defense to the note as against the payee, or any holder thereof with notice, and there was evidence tending to sustain such defense. Again, it is said by counsel that the warranty upon which the sale was made provides for the return of the animal to Galesburg, Ill., in case of its failure to fill the terms of the agreement, and that defendants having failed to so return it, cannot rescind the purchase and refuse to pay the agreed price. If the defense relied upon by the defendants and submitted to the jury were a breach of warranty merely, there would be much force in the argument thus advanced. But such is not the case. The sole defense submitted to the jury is that which is based on an alleged fraud by which defendants were induced to sign the note on the representation that one Stover who joined them in making the instrument had agreed to become a party to the purchase of the horse and pay his equal share with the other purchasers, when, as it afterwards transpired, Stover was in fact acting as a stool pigeon in the interest of the payee, and, when the defendants' signatures were secured to the note, he was released from all liability thereon without any consideration, except his assistance in perpetrating the fraud. Under such circumstances, the defendants were not obliged to assume the expense and responsibility of shipping the horse to Illinois to effect a rescission of the purchase. To hold otherwise is to say that, when a contract has been obtained by fraud, the innocent party must perform a part of its stipulations in order to rescind and repudiate the remainder. If a contract has been obtained fraudu-

Digitized by Google

lently, the taint attaches to and effects all its stipulations alike. If the party acts with reasonable promptitude when the fraud is discovered, a rescission of the contract will be effected by a bona fide offer to return the consideration received and by holding it in readiness to be delivered if the offer to return be refused."

See Decision No. 1112.

Banks and Banking: Payment of Depositor by Insolvent Bank.

This decision involves the petition of Martin K. Berger, who was allowed to intervene against the receivers appointed for the Columbia Banking & Trust Company, the defendant. The Columbia Banking & Trust Company, went into the hands of a receiver on the 9th day of February, 1906. It appears that Martin K. Berger, on the 8th day of February, 1906, withdrew from the defendant bank the money which he had on deposit, amounting in all to $2,015,75. He was undoubtedly prompted to do this by rumors in reference to the bank's insolvency. The money was paid him at the teller's window, and he received one-fourth of the deposit in currency and the rest, $1,500, in three bags of silver dollars, containing $500 each. As it was rather inconvenient to carry the money away from the bank in this shape he redeposited the money and obtained a New York draft for the same. The draft was drawn upon the National Bank of Commerce of New York. He took the draft to the Bank of Charleston and deposited it to his account there on that day. He sought to be subrogated to the rights of the National Bank of Commerce in certain collateral deposited by the defendant, Columbia Banking & Trust Company, with the National Bank of Commerce, and which collateral was in the hands of the receivers of the defendant bank. His petition was refused in the court below, but the decree denying his petition was reversed upon appeal. The Appellate Court held that if a depositor is paid the amount of his deposit without knowledge on his part that the bank is insolvent, the payment is good and the depositor will be protected. The mere fact that the depositor had heard rumors to the effect that the bank was insolvent, was not knowledge on his part that the bank was insolvent, and the fact that the bank was kept open and continued doing business constituted a representation on the part of the officers of the bank that the bank was solvent. Furthermore, the redepositing of the money which he had received from the bank and the receipt by him of a New York draft made him the holder of a draft issued for cash, paid into the bank, when the officers of the bank knew that the bank was insolvent. Therefore he was entitled to be subrogated to the rights of the bank upon which the draft was drawn in the collateral held by that bank to cover the drafts of the defendant bank upon it.

Digitized by Google

The court said in part:

"The testimony does not show that the payments were made under the belief that the bank was insolvent, nor in contemplation of insolvency, nor with a design to give a preference to those receiving payment over the other creditors of the bank, but with the expectation that the bank would be able to continue business. On the contrary the bona fides of the petitioner was clearly established and his confidence in the solvency of the bank was shown by the fact that he deposited his money with it, after the assurance of the officers that all would be paid, after knowledge of the fact that the bank had stood the run upon it from the 6th to the 8th; after seeing that the bank was conducting its business in the usual way — paying the drafts over the counter in the order in which they were presented; and after determining that he would assist in restoring confidence in others, and thereby enable the bank to meet all demands. 'A bank is insolvent when, from the uncertainty of being able to realize on its assets in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out its hands.' 3 Encyc. of Law, 847. 'The keeping of the bank open, and the conducting of its business in the usual manner, constituted a representation to its customers of the solvency of the bank, upon which they had a right to rely, and, if the bank was known to be solvent by the officers who were charged with its management, the concealment of that fact from a person about to deposit would constitute a fraud upon him. The title acquired by the bank to the money and checks deposited under such circumstances would be avoidable at the election of the depositor, who could bring suit to recover his deposit, without any previous demand. The bank would become a trustee ex maleficio, and would hold the deposit for the use of the depositor, and subject to his right of reclamation.' Wasson v. Hawkins (C. C.), 59 Fed. 233. In the case of McGregor v. Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, the rule is stated that, 'if a bank, though insolvent, is still conducting business, and pays a check of a depositor in the usual course of business, and the depositor had no notice of the insolvency of the bank, the payment is good, and the depositor will be protected. If, however, the depositor is paid, not in the usual course of business, but at a time when he has notice or knowledge that the bank is insolvent, and that the intent of the bank is to create a preference in his favor over other creditors, the payment is not good.' Syllabus. In that case the court uses this language: 'It is a well-known fact that the suspicion that a bank is insolvent causes all depositors who are acquainted with the facts leading to the suspicion to rush at once and withdraw their deposits. A run on a bank is always produced by those who think they have reason to suspect that the bank is in a failing condition; and we are not prepared to hold, if a bank is still in operation, open during the usual hours of business, paying its checks in the order in which they are presented, according to the custom of the bankers, that a depositor, who merely had reason to suspect the insolvency of the bank, this being the motive for his drawing a check, would be required to repay to the bank the amount so withdrawn, less what would be his pro rata share in the assets of the bank, on the day that the amount was withdrawn, in the event that the bank was afterwards forced to liquidation, and was, in fact, insolvent.

Digitized by Google

Neither are we prepared to hold that one who actually knows that a bank is insolvent, but does nothing except to draw his check and present it, and receive payment over the counter, in the usual course of business would be required to refund the amount so withdrawn, less his pro rata share, upon a final winding up of the affairs of the bank.' Even under our assignment law against undue preferences (Civ. Code 1902, § 2647), the question whether the payment made by the debtor is obnoxious to the statute depends upon the intention of the parties to create a preference, and the foregoing facts would not render the payment illegal. Porter v. Stricker, 44 S. C. 183, 21 S. E. 635. Having reached the conclusion that the money when received by the petitioner was free from a trust, the case comes within the principal announced by Mr. Justice Woods in Livingstain v. Banking Co., 77 S. C. 305, 57 S. E. 182: 'Had the checks been issued for cash paid into the bank or before insolvency, the other depositors could have interposed no countervailing equity, and the petitioners would have been subject to subrogation.'"

See Decision No. 1113.

Bills and Notes: Bill of Exchange: Holder Without Notice.

The plaintiff, the bank of Guntersville, is the holder of the illustrated bill of exchange, having acquired the same by the indorsement of A. B. Gibson, the payee named in the bill. M. T. Swift, the drawer of the bill, purchased of A. B. Gibson a bale of cotton, which Mr. Swift desired to sell to the Jones Cotton Company, consequently he drew his bill to the order of A. B. Gibson upon the Jones Cotton Company. The Jones Cotton Company accepted the bill and Gibson transferred it to the bank. Subsequently it developed that a man by the name of S. C. Capehart, of Columbus City, Marshall county, Ala., had a landlord's lien on the bale of cotton and recovered and took possession of said bale of cotton. The Jones Cotton Company refused to pay the bill when it was presented for payment. Had the bill been presented by A. B. Gibson there is no question but that the fact that the consideration for the bill had failed could have been set up by the drawee, the Jones Cotton Company, notwithstanding the fact that the Jones Cotton Company had accepted the bill for the reason that Gibson knew of this landlord's lien, which was undischarged. The bill, however, was in the hands of an innocent holder for value, who acquired the same before the bill's maturity in due course, and the drawee and acceptor could not set up an equitable defense against this holder, the Bank of Guntersville. The judgment in the trial court was in favor of the defendant, the Jones Cotton Company, and against the plaintiff's the Bank of Guntersville, the plaintiff appealed, and the judgment was reversed in favor of the plaintiff.

Digitized by Google

Bills of Exchange: Holder in Due Course.

$ 56.08

4/4/06.

At Sight Pay to the

Order of A. B. Gibson

Fifty-six and 08/100 Dollars

Value received and charge the same to account of
One bale of cotton, bill of lading attached.

To Jones Cotton Co.,
Decatur, Ala.

No.

M. T. Swift

Agent Jones Cotton Co.
Jones Cotton Co.
per H. R. Mason

Digitized by Google

A. B. Gibson

Gibson, the indorser above named, sold to M. F. Swift a bale of cotton, which Swift desired to be shipped to the Jones Cotton Company. Swift drew this bill to the order of Gibson on the Jones Cotton Company and the Jones Cotton Company accepted the draft. Subsequently, but before maturity, Gibson transferred the bill to the bank of Guntersville for value. The bale of cotton, which is the consideration passing from the payee to the maker of the draft, was attached by a person who had a lien upon the bale, and when the plaintiff, the Bank of Guntersville, presented the bill to the drawee, the Jones Cotton Company, for payment, the Jones Cotton Company refused to pay it, because the consideration had failed. The bank as holder sued the drawee and judgment was rendered in favor of the drawee and against the bank. The bank appealed and the judgment was reversed. The court held that whereas if Gibson had sued the Jones Cotton Company, Gibson could not have recovered because Gibson knew this lien was undischarged, the Bank of Guntersville, to whom Gibson had indorsed the bill, could recover for the reason that the Bank of Guntersville was an innocent holder without notice, having acquired the bill in the ordinary course of business and having paid value for the same.

Digitized by Google

The court said in part:

"There can be no doubt that the instruments sued on is governed by the commercial law. Anderson & Co. v. Jones, 102 Ala. 537, 14 South. 871, and authorities cited in that case. The facts in this case are essentially different from the facts in the case of Haas & Co. v. Citizens' Bank of Dyersburg, 144 Ala. 562, 39 South. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61, relied on by appellee. There was no retention of title to the property by the vendor in the case before us. The bank discounting the draft sued on was in no sense the vendor of the bale of cotton forming the consideration of the draft drawn by M. T. Swift on the defendant in favor of the payee, Gibson. When Swift bought the bale of cotton from Gibson, and instructed him to ship it to the Jones Cotton Company, the delivery of the cotton to the common carrier by Gibson, consigned to the Jones Cotton Company in pursuance of Swift's instructions, divested the title out of Gibson. The indorsement by Gibson of the draft, with bill of lading attached, did not operate to put the legal title to the bale of cotton in the plaintiff; nor did it, as said above, constitute the plaintiff the vendor of the cotton. The plaintiff become the owner of the draft before its maturity, in the ordinary course of business, and consequently the drawee and acceptor cannot be heard to set up the defense of failure or want of consideration."

See Decision No. 1114.

Banks and Banking: Payment of Forged Check.

Andrews & Gage are the plaintiffs in this action and sued the Northwestern National Bank, with whom they had an account, because the bank had charged against their account a check in the sum of $926.72, upon which the name of the payee had been forged. The proof brought out at the trial showed that Andrews & Gage were doing a grain and grain elevator business in the State of Minnesota and that a man by the name of P. T. Langdon was their agent in Berlin, North Dakota. Langdon had authority to pay for grain purchased by him for the firm and to ship it to Andrews & Gage at Minneapolis. He had no authority, however, to indorse or sign checks in the name of the firm of Andrews & Gage. Andrews & Gage sent to Langdon a check for $926.72, which was payable to Z. W. Thomas, one of the firm's customers. Instead of delivering the check to Thomas, Langdon forged Thomas's name and deposited the check in the State Bank at Berlin, North Dakota. Langdon opened an acount in the name of Langdon & Company, in which he deposited this check and later deposited $380.25. The said bank indorsed the check and guaranteed prior indorsements. The check was indorsed by several banks which received it in the ordinary course of business and was finally paid by the Northwestern National Bank of Minneapolis, upon which it was drawn, and charged to the account of Andrews & Gage. Langdon

Digitized by Google

was indebted to Andrews & Gage and they called upon him to pay up this indebtedness and he did so by transferring the money in the Langdon & Company account to an account which he created in the name of Andrews & Gage. There was no such corporation or co-partnership as Langdon & Company. He notified Andrews & Gage that the amount of his indebtedness to them was deposited to their credit and delivered to them the bank book of the Andrews & Gage account in the State Bank and they subsequently drew out the money. The forgery was discovered and Andrews & Gage sued the bank which had charged the amount of the check to their account. Judgment was rendered in favor of the bank, Andrews & Gage appealed, and the judgment was sustained. The court held as a general proposition of law that as depositors of the bank, they were the creditors of the bank to the extent of their balance and could disregard any charge against their account which was not authorized by them or incurred by reason of their negligence or misconduct. On the other hand it was held that since the money realized from this forged check came back into their hands they suffered no loss. In other words, the money realized from the forged check was deposited to the account of P. T. Langdon & Company, transferred by Langdon to the account of Andrews & Gage, and Andrews & Gage got the money which was realized upon this check which they had signed and which had been subsequently forged; therefore the bank was not liable to them.

The court said in part:

"The facts present rather an unusual condition of affairs, but we are satisfied that the court reached the proper conclusion. The appellants contend that as depositors they were creditors of the Northwestern National Bank to the extent of their balance therein, and entitled to disregard any charge made against their account which was not authorized by them or made by reason of their negligence or other misconduct. The correctness of this general proposition cannot be questioned, but nevertheless Andrews & Gage are not in a position to require the Northwesten National Bank to credit their account with the amount of this check. The appellants make an ingenious argument, but the result which they desire to bring about would be so unjust and inequitable as to suggest that a fallacy lurks somewhere in the process of reasoning. The appellants have not been injured by the fact that the Northwestern National Bank paid this check upon a forged indorsement, and their theory, if accepted, would merely result in substituting the bank for the defaulting employee as the creditor of Andrews & Gage. The check for $926.72 came into Langdon's hands on October 26th, 1905, and with it he opened an account with the State Bank of Berlin in the name of P. T. Langdon & Co. Ten days later he deposited an additional sum of $380.25 in the account, making a total of $1,301.97. On October 27, 1905, he drew a check on the account of P. T. Langdon & Co. for the sum of $1,003.01, and deposited it in another account in the same bank in the name of Andrews & Gage. The result of all this juggling was that the $926.72, the pro-

Digitized by Google

ceeds of the check with the forged indorsement, and an additional $76.29 from some other source, went into the new Andrews & Gage account. Langdon was then short in his accounts with his employers, Andrews & Gage, and when, on October 27th, 1905, they made a demand on him for a settlement he responded by turning over to them the account in the State Bank of Berlin, which he had evidently created for that purpose. That is, Langdon was short in his accounts and no money with which to pay. The check for $926.72 which was delivered to paying Thomas was in effect cashed by him. With the proceeds which still belonged to Andrews & Gage or to the Northwestern National Bank, Langdon assumed to pay his debt to Andrews & Gage. It does not appear that at that time Thomas was entitled to the check, and it was sent to Langdon for delivery to Thomas upon certain conditions. If Langdon had forged the indorsement and himself presented the check to the Northwestern National Bank and secured the cash, carried it to the office of Andrews & Gage and handed it to them in settlement of his shortgage, the situation in legal effect would have been identically the same as at present. Andrews & Gage could have put the money in the bank. They would have had Thomas' wheat, and still owed him for the same. The forged check would have been where it is now, Langdon would still have been short in his accounts, and the net result of the entire transaction would have been the liability of Langdon for prosecution for forgery. We cannot see that the fact that this business was transacted by the use of credits, instead of the handling of actual cash, makes any difference so far as the liability of the Northwestern National Bank is concerned. It paid the check upon a forged indorsement, and thereby became liable to its depositor for any damages thereby sustained by him. If the depositor lost nothing, he should recover nothing. If a forged check for $100 on B's account is paid to A, and A immediately on being caught hands the money back to B, it would not be claimed that B could sue the bank and recover the $100 which had been wrongfully charged to his account. Again, suppose A, in the employ of B, owes $100, which B cannot collect. A is given a check on the bank payable to D, with instructions to deliver it to D. Instead of doing so, he forges the payee's name, draws the money from the bank, and with it pays his debt to B and receives a receipt in full. Can B collect $100 from the bank? If so, it would be quite easy for A and B to arrange for the bank to pay A's debt to B, leaving B's account unimpaired. Of course A might take some chances of criminal prosecution, but Langdon was willing to assume the chances in this instance in order to square his account with his employers. The result of the entire transaction is that the money started with Andrews & Gage and, after passing around the circle, came back to him. The fact that credits, instead of cash was used, does not change the legal effect. Langdon's debt to them is to that effect unpaid. There is nothing in this record which shows that the appellants were damaged; and the order of the trial court is therefore affirmed."

See Decision No. 1115.

Digitized by Google

Banks and Banking: Clearing House Banks: Insolvency.

The plaintiff, John S. Davenport, is the receiver of the Bank of Staten Island, which bank was taken possession of December 31st, 1903, by the State Superintendent of Banks. The defendant, the National Bank of Commerce in New York, was a member of the New York Clearing House and cleared for the Bank of Staten Island, which was not a member. The defendant had in its possession at the time the Bank of Staten Island was taken over by the Superintendent of Banks, $11,000 cash belonging to the Bank of Staten Island and bills receivable amounting approximately to $228,000. These items secured the account of the Bank of Staten Island with the Bank of Commerce in New York. On the business day following the 31st of December, 1903, the National Bank of Commerce in New York paid $102,000 of checks, which were drawn upon the Bank of Staten Island. To reimburse itself the National Bank of Commerce collected the bills receivable and turned back to the receiver of the Bank of Staten Island about $6,000 in money and some securities which it had not sold or collected. The receiver of the Bank of Staten Island sued the National Bank of Commerce for the purpose of recovering the value of the collateral which had been turned into cash by the National Bank of Commerce and with which the National Bank of Commerce had reimbursed itself after paying the checks drawn upon the Bank of Staten Island. The absolute good faith of the National Bank of Commerce was not questioned, that the bank acted in all these transactions honestly and with no intention of preferring any creditor is practically admitted. It was shown at the trial of the case before the referee that as a matter of fact $70,000 of these checks which were paid represented the deposits of certain depositors, who obtained information of the insolvency of the Bank of Staten Island through the shrewdness of a certain individual, and these depositors, upon obtaining this information, drew checks for the amounts of their deposits and these checks were deposited with the Stapleton National Bank, also a bank of Staten Island, and were presented by the Stapleton National Bank to the correspondent of the Stapleton National Bank in the city of New York, namely the National Park Bank. The National Park Bank presented them at the Clearing House and the checks were paid by the National Bank of Commerce. The receiver of the Bank of Staten Island, Mr. Davenport, contended that the defendant knew of the insolvency of the Bank of Staten Island on the day that the defendant paid these checks, and therefore the defendant should not have paid the checks. The rules of the New York Clearing House provided that a bank, which is a member of the New York Clearing House, cannot cease to pay the checks of a non-member, for which the member clears, except by giving notice to the other members of

Digitized by Google

the Clearing House, and this notice does not take effect until the exchanges of the morning following the notice. It is evident, consequently, that the National Bank of Commerce could not have done otherwise than have paid these checks. As a matter of fact, they notified the other banks that they would not continue to pay the checks of the Bank of Staten Island, but under the rules of the Clearing House they were obliged to continue to pay the checks after this notice until the exchanges of the following day had been made. The receiver of the Bank of Staten Island further contended that if the National Bank of Commerce could not cease to pay the checks of a non-member bank until the day following the notice under the rules of the New York Clearing House, that this was the misfortune of the member bank. The referee in his opinion stated that this might be true were it not for the fact that the non-member bank in making its contract with the member bank to clear for it made the contract having in mind the rules of the New York Clearing House. In fact the contract states that it is subject to these rules and regulations. Having in mind the rules of the Clearing House, the National Bank of Commerce also required the Bank of Staten Island to deposit with it security in the form of cash and bills receivable for its protection. The case was decided by the referee in favor of the defendant, and this judgment in favor of the defendant was affirmed by the Appellate Division upon the opinion of the referee.

A part of the opinion of the referee reads as follows:

"The agreement now under consideration was entered into at a time when the bank was solvent, and, when it deemed it of value to it, that this defendant should clear for it. To secure that advantage it had the legal right to enter into the contract which it did make, a contract which authorized the defendant to make use of the bills receivable for its protection in the event that the Bank of Staten Island should fail to keep on deposit with the defendant sufficient moneys to pay any and all checks that under the rules of the association the defendant should be compelled to redeem. The defendant was compelled to redeem while that contract was in force checks amounting to about $102,000. Hence it had the right to use the cash on hand and the bills receivable to the extent necessary for its reimbursement. They were in legal effect collateral in its hands to secure the payment by the Bank of Staten Island of all the checks drawn upon it which the defendant should be obliged to redeem under the Clearing House rules, Its right to employ them, as collateral is usually used, to satisfy the obligation they were intended to secure, seems to me unquestionable, though it were not the fact that there existed an arrangement beween these two banks and the Clearing House which constituted a tripartite agreement upon ample consideration for the mutual benefit of all the parties to it. Such, however, was the legal effect of the arrangement into which these parties entered. And so the Court of Appeals held in O'Brien v. Grant, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361, where similar relations and situations were carefully considered by that

Digitized by Google

court. The learned counsel for the plaintiff insists that O'Brien v. Grant is not on all fours with this case, because in that one the superintendent had not taken possession. While there is that distinction between the two cases, the fact is that in that case the redeeming bank in the Clearing House Association not only knew that the insolvency was suspected, but also knew that the bank had closed its doors. But, as I understand the opinion, the decision was not rested upon any such distinction. Instead, the court held that the suspected insolvency of the non-member bank did not excuse the member bank from the performance of its obligations to the Clearing House bank and hence the agreement under which it undertook to clear for a non-member bank entitled it to hold and apply the securities which it held for its protection in payment of the amount so paid by it. The opinion of the court seems to me to indicate very clearly that the decision would not have been different had the member bank in that case known that the non-member bank was insolvent, instead of suspecting it. The reasoning of the opinion which led to a decision which sustained the right of the member bank to do precisely what the member bank did in this case is not rested at all upon the certainty or uncertainty of the member bank as to the insolvency of the non-member bank. Instead, it demonstrates that the agreement as made was not in violation of the State Banking Corporation Law, or any other law; that it was such an agreement as the three parties to it were competent to make; that its terms were unambiguous, and entitled the member bank to redeem the checks drawn upon the non-member bank on the first business day following the giving of the notice, and to employ the collateral which it held to satisfy its claim for moneys paid out in the redemption of such checks. If, however, I am giving to the decision a broader construction than it is entitled to, it nevertheless seems to me clear that there is no opportunity for a distinction beween the two cases. In that case the non-member bank had closed its doors and the member bank knew it and suspected insolvency. In this case the superintendent took possession, and because of that fact the defendant's officers probably suspected insolvency. But they were not advised by the superintendent or by any one else prior to the redemption of the checks in question that the bank was solvent. In both cases there was of necessity a suspicion of insolvency, and nothing more. From every point of view, therefore, the two cases are in all material respects similar. The plaintiff urges specifically that the contract was in effect only to continue redemption for twenty-four hours after the superintendent of banks should take possession, and for that reason void.

"It must be conceded that such has been its effect, not only in this case, but also in the O'Brien v. Grant case. But that was not the purpose of the contract, although it has proved to be an incident to it. Insolvency was not then anticipated by either bank. Had it been, the defendant certainly would not have entered into it. The plaintiff's position, then, comes at last to this: That the contract, sanctioned by the local precedents and customs covering many years, forbidden by no status, entered into in good faith and for mutual helpfulness, is void, and therefore non-enforceable, because it happens in the changed conditions resulting in the unexpected insolvency that through it some depositors secure a preference. To state the proposition

Digitized by Google

is to refute it. More than that, the proposition was necessarily involved, and therefore passed upon in O'Brien v. Grant. It seems to me to have been explicitly passed upon, although the proposition now presented was differently, and not so well, expressed as in this case. It is further objected by the plaintiff that the Bank of Staten Island had not complied with all the provisions of the amendment to the Clearing House rules adopted February 11, 1903. As I find the fact to be otherwise, there is no occasion for further consideration. The claim that the defendant could have avoided redemption of the checks by signifying its intention to withdraw from the Clearing House Association, while not clearly demonstrated, may from my point of view be treated as if it were, without resulting in help to the plaintiff. The defendant could not take such step or any step in the direction of avoiding the contract to which the Clearing House Association was a party, without injury to it. It was not called upon to suffer any injury whatever. It was to save it from injury generally that the collateral was placed in its hands, and specifically to save it harmless because of checks redeemed, as these were, for the Bank of Staten Island, through the Clearing House, after completing the exchanges of the morning following the notice of discontinuance of the arrangement."

See Decision 1116.

Contracts: Specific Performance: Mutuality of Contracts: Entirety of Contracts.

The plaintiff in this action, the Fairford Lumber Company, filed a bill against the Tombigbee Valley R. Company, for the specific performance of a contract. The Tombigbee Valley R. Company, through its attorneys, made a motion to dismiss the bill on the ground that the bill was not one which a court of equity could entertain. This motion was overruled and the Tombigbee Company appealed. The overruling of the motion was reversed by the higher court for the reason that the complainant, the lumber company, sought to enforce the specific performance of a contract, which the higher court did not think could be specifically enforced. In the first place, there must be mutuality of contract, that is, both parties to a contract must have reciprocal rights, and if one party to the contract could not be compelled to specifically perform his side of the contract he could not compel the other party to the contract to specifically perform the other side of the contract. In this case the lumber company was the assignee of the original parties to one side of the contract and by the terms of the contract the assignors of the lumber company were to operate a saw mill among other things. The court held that it could not decree a specific performance of a contract involving a succession of acts which require the exercise of special knowledge and skill, and if the plaintiff or its assignors could not have been compelled to specifically perform

Digitized by Google

its side of the contract, they could not bring an action to compel the railroad company, the defendant, to specifically perform its side of the contract. The railroad's side of the contract was that it would transport the logs and lumber of the complainant at certain rates. The lumber company sought specific performance on the part of the railroad company for the reason that an action for damages against the railroad company for non-performance of the contract would not have availed anything, because the railroad company was insolvent. The higher court, in reversing the judgment of the lower court, would not decree specific performance, holding that this was not one of the class of cases which a court of equity could entertain.

The opinion follows in full:

TOMBIGBEE VALLEY R. CO. v. FAIRFORD LUMBER CO.

(Supreme Court of Alabama. May 14, 1908. Rehearing Denied June 18, 1908.)

47 So. R. 88.

SPECIFIC PERFORMANCE — MUTUALITY OF REMEDY — CONTRACTS INVOLVING RECIPROCITY OF OBLIGATION AND DUTY — CONTRACTS ENFORCEABLE — PERFORMANCE OF CONTINUOUS ACTS DURING LONG PERIOD — CONTRACTS ENFORCEABLE IN ENTIRETY — CONTRACT TO BE CONSIDERED UPON STATUS EXISTING AT EXECUTION.

1. A contract involving reciprocity of obligation and duty will not be specifically enforced in favor of a party who on his part has not performed, cannot be compelled to perform, and is not capable of performing.

2. Contracts which provide for a succession of acts, whose performance cannot be consummated by one transaction, but will be protracted and require continued supervision, with the exercise of special knowledge, skill, or judgment, will not as a rule be specifically enforced.

3. A contract, to be specifically enforceable, must be such as can be enforced in its entirety; a partial enforcement by piecemeal not sufficing.

4. In determining whether a contract is specifically enforceable, it must be considered with reference to the status existing at the time of its execution, and not in view of subsequent conditions.

5. Complainant's predecessors contracted to continuously operate a sawmill as long as they owned it, and to grant to a railroad company to be organized by respondent's predecessors such rights of way as might be required by the company for the extension of its line, and to furnish roadbed and lay ties ready for rails upon spurs to be built through lands whereon timber was to be cut. Held, that the contract was for such a succession of acts requiring protracted supervision that it was incapable of being specifically enforced as against complainant's predecessors, and hence performance by the successor of the other party to the contract could not be enforced in favor of complainant.

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by the Fairford Lumber Company against the Tombigbee Valley Railroad Company for specific performance of a contract.

Digitized by Google

From a decree overruling a motion to dismiss the bill for want of equity, respondent appeals. Reversed and rendered.

The Tombigbee Lumber Company, by its owners, entered into a contractual agreement with John T. Cochrane, on behalf of himself and his associates, which will be later set out. Afterwards the Tombigbee Lumber Company sold and signed its property and the rights under the contract above mentioned to one A. S. Terrill, who in turn conveyed it to the present plaintiffs, the Fairford Lumber Company. The contract sought to be specifically enforced is as follows:

"This agreement, made and entered into this 1st day of October, 1903, by and between John T. Cochrane, on behalf of himself and associates, and Henry C. Flowers and Frank Hagerman, for themselves and their associates, witnesseth: Whereas, the second parties own or control all of the stock of the Tombigbee Lumber Company, which is the owner of the stocks and bonds of the Tombigbee & Northern Railway Company, which owns and operates the line of railway in Washington county, Ala., and the first party owns or controls all of the stock of the Carrollton Short Line Railway, which owns and operates a line of railway in Pickens county, Ala.; and whereas, the parties are desirous of making a contract as hereinafter set forth: Now, therefore, in consideration of the premises and the covenants herein made it is hereby agreed:

"(1) The first party shall, on or before the 1st day of April, 1904, cause to be organized under the laws of Alabama a railroad company (herein called the 'new company'), with a capital stock of one hundred and fifty thousand dollars ($150,000), which shall not be increased, and he shall cause to be issued by said company one hundred and fifty thousand dollars ($150,000) of first mortgage bonds, there being one hundred and fifty (150) bonds of one thousand dollars ($1,000) each, payable at the Fidelity Trust Company, at Kansas City, Mo., thirty (30) years after date, with five per cent. (5%) annual interest, payable semi-annually, redeemable at any interest-paying date at par plus five per cent. (5%) of the principal — default for ninety (90) days in the payment of interest shall cause principal to become due — secured by the first mortgage upon all of its property then owned or thereafter to be acquired. This mortgage shall name some one designated by second parties as mortgagee, and be in general form like that now on the Tombigbee & Northern Railway, and shall be a first lien on the ten-mile extension to be made. If such New Company be so organized, and said bonds and stock issued by that date (time being of the essence of this contract), then the second parties will cause the Tombigbee & Northern Railway Company to sell all its property to said New Company upon these conditions precedent: (2) The Tombigbee & Northern Railway Company shall, on or before the 1st day of April, 1904, in all its parts, without any cost or expense to it, be by the first party standardized so as to be changed from a narrow to a standard gauge railroad in good condition for operation, but the actual work of changing the rails shall not be done until all the work of strengthening the bridges and changing the grades and embankments, where such changes are needed, shall have been first done, leaving the changing of the rails as practically the last work. (b) The five (5) narrow-gauge engines and fifty-seven (57) narrow-gauge log cars of the Tombigbee & Northern Railway Com-

Digitized by Google

pany, which it now has on hand, on or before the 1st day of April, 1904, without cost or expense to it, be by the first party exchanged for three (3) standard-gauge engines and twenty (20) suitable standard-gauge log cars, and standard-gauge trucks shall by the first party be put under all the other narrow-gauge cars now in the service needed on the road as standardized. This change of equipment shall not be actualy made until the time when the rails are laid, so as to make a standard-gauge road; the purpose being to have the road out of operation for as short time as reasonably practicable. (c) When the Tombigbee & Northern Railway Company is thus standardized (if done within the time fixed, time being the essence of the contract) without cost or expense to it, the second parties will cause, in consideration of one hundred and fifty thousand dollars of stock and one hundred and fifty thousand dollars of bonds of the New Company to be organized as hereinbefore stated, to be executed by the Tombigbee & Northern Railway Company a deed conveying to the New Company all of the property of the Tombigbee & Northern Railway Company free and clear of mortgage or judgment lien now or hereafter existing on any cause of action arising prior to October 1, 1907. The first party shall cause the New Company, on or before October 1, 1905, to extend the Tombigbee & Northern Railway with standard-gauge main tracks at least ten (10) miles from its prensent northern terminus, passing through the lands of the Tombigbee Lumber Company, so far as they extend, in a generally northerly direction towards Healing Springs, Ala., or its vicinity, as the then conditions may seem best to the corporate authorities of the New Company; but this extension shall be made from time to time as fast as needed by the wants of the Tombigbee Lumber Company, its successors and assigns. If this extension is made by said New Company by October 1, 1905 (time being the essence of the agreement), the Tombigbee & Northern Railway Company will transfer and deliver the one hundred and fifty thousand dollars of stock of the New Company to such person as may be designated by the first party, in consideration of his causing said extension of ten (10) miles to be constructed by said New Company.

"(2) So long as second parties own or control it, and so long as the first party has complied with the conditions of this contract, the second parties will cause the Tombigbee Lumber Company to keep its mill in operation and also to grant to the New Company such rights of way as may be required by said New Company for extension of main line through the lands of the lumber company without any charge or consideration for such conveyance or right of way other than the mutual covenants and agreements herein contained. The Tombigbee Lumber Company is the owner of fifty thousand dollars ($50,000) of bonds of the Tombigbee & Northern Railway Company, and the second parties shall cause it, when the transfer of the railroad property to the New Company is made, to cancel said bonds and cause to be released the mortgage securing the same. The Tombigbee Lumber Company shall furnish the roadbed, right of way, and lay the ties ready for the rails upon spurs to be built to and through the lands whereon no timber has been cut, in consideration of the date of this contract; and the first party shall cause the New Company, its successors and asigns, from the date when it acquires the railroad prop-

Digitized by Google

erty, to charge the Tombigbee Lumber Company, its successors and assigns, for hauling its logs and lumber prices not to exceed those stated in Schedule A hereto attached and made a part hereof, which schedule of charge shall remain in force for ten (10) years next after the date hereof, as needed, and, as needed, build spur railroad tracks to and through the land of the lumber company whereon no timber has ben cut, furnishing the rails, fastenings, and spikes, and laying the track. Not more than six (6) miles of rails shall be in said spur tracks at any one time. The railroad company shall not take up any spur until the timber adjacent thereto has been removed by the lumber company; but the lumber company must not consume an unreasonable time in so removing such timber. So long as all conditions hereof are complied with, the second parties agree to cause the Tombigbee Lumber Company to allow the New Company to use whatever dead and down timber it may require for bridge and cross-tie purposes at three cents per tie, and to permit standing timber to be cut by the New Company only in case of necessity for use of its road in its maintenance and extension, the price of four cents per tie to be paid therefor, and permit the New Company to use for fuel pine knots and limbs and any down stuff not suitable to make ties or lumber, without charge therefor.

"(3) In order to facilitate the work contemplated by this contract, the second parties shall cause the Tombigbee & Northern Railway Company to immediately appoint John T. Cochrane as its general manager, and as such give him charge and absolute authority over the operation and management of the business of the company and control of its finances, provided he shall not create any new debits against the Tombigbee & Northern Railroad Company or its property. During his incumbency he shall pay all operating expenses, repairs, and maintenance incurred by him, and so long as he does he shall take all of the earnings. Said employment as general manager shall be without other salary to said Cochrane, and shall last so long as each condition of this contract is complied with up to the time when said property is conveyed to the New Company, not exceeding, however, six (6) months from this date in any event. As a condition precedent to this contract being in force, to secure the portion of this agreement requiring the standardizing of the present Tombigbee & Northern Railway Company and the payment of operating expenses incurred after this date and before the transfer to said New Company, said Cochrane shall forthwith deposit with the Fidelity Trust Company, of Kansas City, Mo., the sum of five thousand dollars ($5,000), to be applied upon any such unpaid operating expenses, provided that each month when he has paid all the operating expenses incurred for that month he shall be entitled to draw down one-sixth of the amount, and should the standardizing be completed before the end of the six (6) months he shall be entitled to draw down the entire amount thus deposited. As another condition precedent, he shall forthwith deposit with the Fidelity Trust Company, of Kansas City, Mo., all the stock of the Carrollton Short Line Railway Company, indorsed in blank, as security for the agreement to have the road standardized on or before the 1st day of April, 1904, and when said standardizing is completed and paid for said stock of the Carrollton Short Line Railway Company hereinabove required to be deposited shall

Digitized by Google

condition secured by such stock required herein of him and the New Company is performed within the time fixed, and in like manner said Cochrane and his associates shall have the voting power upon the stock in said company so long as each condition hereof is performed in the time fixed. In case of any default in said condition, the voting power shall be in the person whose name is inserted by the Fidelity Trust Company, of Kansas City, Mo., as indorsee.

"In witness whereof, the parties have hereunto signed our names and attached our seals in triplicate the day and date first above written. (Properly signed and sealed.)

"Schedule A.

"(1) For hauling logs to mill and lumber to shipping points at the rate of $1.50 per M feet on the basis of the cut of the mill. This charge shall include setting empty cars where and when required, and moving loads likewise, or when convenient to the railroad company, if not interfering with operations of the lumber company. For hauling the lumber in yard, or made from logs in yard, on or before October 1, 1903, the rate shall be $1.50 per M feet of the lumber hauled. (2) Freight rates on crude turpentine, naval stores, and other stuff shall be as follows:

Merchandise from Bluffs to Fairford at	$12 00	per car.
Merchandise from Calvert to Fairford at	10 00	" "
Merchandise L. C. L. Bluffs to Fairford at	5 cents	per cwt.
Merchandise L. C. L. from Calvert to Fairford	5 "	" "
Naval stores from store No. 2 to Fairford at	$14 00	per car.
Naval stores from store No. 2 to Calvert	16 00	" "
Naval stores from Fairford to Calvert	10 00	" "
Naval stores from store No. 2 to Bluffs	18 00	" "
Naval stores from Fairford to Bluffs	12 00	" "
Crude staves, empty barrels, etc., from any point on the line to Fairford at	10 00	" "

"By car is meant when transported in standard-gauge cars. If cars of narrow-gauge capacity are used in hauling merchandise, naval stores, and crude turpentine and other commodities (except logs and lumber), the charge shall be at the freight rates in force prior to date October 1, 1903. (3) For switching from mill to planer and kiln, $2 per car. (4) Any sums received by the railroad company by virtue of arrangements with connecting carriers shall not be applied upon or used to reduce the above charges.

"Exhibit B.

"This agreement, made and entered into this 13th day of April, 1904, by and between the Tombigbee Valley Railroad Company, first party, and the Tombigbee Lumber Company, second party, witnesseth: Whereas, upon October 1, 1903, a contract was executed in the form shown by copy hereto attached, marked 'Exhibit A,' and made a part hereof; and whereas, the New Company mentioned in said contract has been organized under the name of the Tombigbee Valley

Digitized by Google

Railroad Company; and whereas, certain duties and obligations were contemplated by the said contract to rest upon the Tombigbee Lumber Company and the New Company so to be formed; and whereas, said contract has been to a greater or less degree carried out by the parties, but no formal contract has been signed by the Tombigbee Lumber Company and the New Company to do and perform the things mentioned in paragraph 2 of said contract and Exhibit A thereto: Now, therefore, in consideration of the premises, each of the parties hereto agrees to do and perform all of the acts and contemplated to be performed by it under and pursuant to said paragraph 2 of said contract and Exhibit A2 thereto.

"In witness whereof, the parties, by their respective officers, have signed this instrument and caused the seals of their respective corporations to be attached on the day and year first above written."

The bill alleges that originally the timber lands and sawmill property which is now owned by complainant and the railroad property now owned by respondent were one and the same, and that when it was determined to sell and divide the same this contract was made; that following the making of the contract the Tombigbee Lumber Company, then in full enjoyment of all the contract rights with the railroad company above set out, sold and conveyed all its property of every kind and description, and particularly the traffic contract with the railroad company, to A. S. Terrill, and that Terrill purchased it expressly subject to the said traffic contract, and agreed on his part to abide all its terms and stipulations; that shortly after Terrill purchased he associated others with himself, and on the 17th day of April, 1905, they organized the complainant corporation, and he conveyed the property in its entirety, and all his rights in connection therewith and incident thereto, including the right to have and enjoy the said freight or traffic contract, to the said Fairford Lumber Company, complainant in this case. The bill further shows that the life and existence of complainant company and its business is dependent upon the movement of logs to the manufacturing plant and the movement of the finished product from the plant to points where it can reach the outside world; that the company is violating its traffic contract and fixing arbitrary charges, such as will destroy the very business existence of the complainant. It is further alleged that the company cannot be made to respond in damages, owing to its insolvency. The prayer of the bill is for a decree requiring and commanding defendant in all things to abide by and specifically perform the contract until its expiration, and forever enjoining and prohibiting the defendant from charging the complainant any freight rates or charges for logs shipped or hauled to the mill of complainant or for lumber shipped or hauled from the mill of complainant to the shipping point other than those fixed, agreed upon, and made by said contract, and for a statement of account between the parties, to ascertain the amount of freight and overcharges exacted from complainant over and above the contract price.

Motion was made to dismiss the bill for want of equity, and demurrers were interposed raising the question that the contract is not one that a court of equity will specifically enforce, and because in and by the contract sought to be enforced a special rate is attempted to be given to a corporation and its successors and assigns, which is not

Digitized by Google

given to aid in the development of any industrial enterprise in the state, and because it appears from the allegations of the bill that in and by the contract sought to be enforced a special rate is given to a corporation, and it is not shown that such special rate is given to aid in the development of any industrial enterprise and published as required by law. Other demurrers were interposed as to accounting features of the bill not necessary to be here set out. Motion and demurrers were overruled.

Gregory L. & H. T. Smith and R. W. Stoutz, for appellant. Fitts, Leigh & Leigh, for appellee.

ANDERSON, J. This court, in a very full discussion of the doctrine of specific performance of contracts, speaking through Brickell, C. J., in the case of Irwin v. Bailey, 72 Ala. 467, says: "The principles upon which a court of equity exercises its peculiar jurisdiction to enforce the specific performance of contracts are well known, and have been of frequent consideration and application in the past decisions of this court. The court will not intervene, unless the contract is fair, just, reasonable, and equal in all its terms and parts, is founded upon an adequate consideration, and its specific execution is free from hardship and oppression. If, on either of these points, there be a well-founded objection, the court abstains from interference, leaving the party complaining of a violation of the contract to the remedies afforded him in courts of law. In the exercise of the jurisdiction, the court is invested with a discretion — not arbitrary or capricious, but a sound, judicial discretion, molding and tempering its action, or the refusal to act, in view of the circumstances of the particular case, and from them determining whether the conscience of the party charged with a violation of the contract is so affected that moral and equitable duty compel him to a strict performance, rather than to a payment of such damages as a court of law would award against him. A primary duty of the court is to examine the contract, not merely as a court of law would examine it, to ascertain what the parties have in terms expressed, but what in truth was the real intention of the parties, and to carry that intention into effect, or, if it cannot be carried into effect, to leave the parties to their legal remedies. Hipwell v. Knight, 1 Y. & C. Exch. 411. There is no class of cases, to which the jurisdiction of a court of equity extends, that the maxim 'he who seeks equity must do equity' is more rigidly applied. Hence it results that the contract or agreement which the court is asked to enforce specifically must not only be certain, fair, just, reasonable, and equal in all its parts and terms, must not be merely voluntary, but founded upon a valuable and adequate consideration, and it must be mutual in its operation and effect. As is said by Prof. Pomeroy: 'The contract must be of such nature that both a right arises from its terms in favor of either party against the other, while the corresponding obligation rests upon each towards the other, and also that either party is entitled to the equitable remedy of a specific execution of such obligation against the other contracting party.' Pomeroy on Contracts, § 162. Or, as is said in another work: 'A contract, to be specifically enforced by the court, must be mutual; that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore,

Digitized by Google

whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending the execution in the former.' Fry on Specific Performance, § 286. 'I have no conception,' said Lord Redesdale, in Lawrence v. Butler, 1 Sch. & Lef. 13, 'that a court of equity will decree a specific performance, except when both parties have a right by the agreement to compel a specific performance, according to the advantage which might be supposed to have been derived from it.' Were it otherwise, a specific performance might be decreed when, if it was disadvantageous to the party complaining, he could not, at the instance of the other party, be compelled to perform. There are some cases in which a want of mutuality in the contract at the time it was entered into is not regarded as an insuperable obstacle to specific performance. These rest upon their own peculiar circumstances and facts. Performance by the one party, and its acceptance by the other, may entitle the party performing to the assistance of the court, though he could not have been compelled to perform. The contract of an infant is voidable; but, after arriving at age, he may affirm and enforce it, notwithstanding the original want of mutuality. The class of cases to which we refer are exceptions to the general principle, and involve considerations which justify the court in the specific performance of the contract. But when the contract, in its nature and character and according to the intention of the parties, involves and imposes a reciprocity of obligation and duty, there is no authority for enforcing specific performance of it in favor of a party who on his part has not performed, cannot be compelled to perform, and is not capable of performing. Cooper v. Pena, 21 Cal. 404," The foregoing doctrine was reaffirmed in the case of Electric Co. v. Mobile, 109 Ala. 195, 19 South. 721, 55 Am. St. Rep. 927.

Applying the rule to the case at bar, the question arises, could a court of equity have required a specific performance on the part of Flower & Hagerman of the contract as entered into with Cochrane, the predecessor of this respondent? We think not. The contract required of them the continuous operation of the mill, so long as they owned it (not exceeding, of course, the period of the contract), the granting of such a right of way as was required by the new company for the extension of its main line, the furnishing of roadbed and right of way and the laying of the ties ready for rails upon spurs to be built to and through lands whereon timber has ben cut. " Contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in such oversight. . . . are not, as a rule, specifically enforced," Pomeroy on Specific Performance of Contracts, § 312, and cases cited in note 5; Waterman on Specific Performance of Contracts, § 49; Electric Co. v. Mobile, supra. So, too, must the contract be such a one as can be enforced in its entirety. A partial enforcement by piecemeal will not suffice. A court of equity would find it quite difficult to require and supervise the operating of a big sawmill for a considerable period. together with the other things covenanted to be done by the complainant's predecessors.

Digitized by Google

Flower & Hagerman. It is true, under the terms of the contract, the successors are not compelled to operate the mill, and that it was only to be operated while owned by Flower & Hagerman, so long as they owned it; but we must deal with the contract upon the status existing at the time of its execution, and not according to subsequent conditions. As said above, there are some cases in which a want of mutuality in the contract at the time it was entered into is not regarded as an insuperable obstacle to specific performance; but this case is not within the exception, as it requires and involves and imposes a reciprocity of obligation and duty. Therefore, dealing with the contract as enetred into between the parties, it was incapable of being specifically enforced in a court of equity as against Flower & Hagerman, and it would be inequitable to permit their successors to require specific performance of the respondent, even if their undertaking is susceptible of specific performance in a court of chancery, which we need not decide.

Moreover, while the original contract did not require the operation of the mill by the successors of Flower & Hagerman, yet this complainant was required, under the terms of the conveyance through which it claims any rights in the premises, to perform all the terms of paragraph 2 of the original contract, except as to the cancellation of certain bonds, and which included the operation of the mill and doing of other things heretofore enumerated. The cases of Evans v. Cincinnati R. R. Co., 78 Ala. 341, Baxley v. Tallassee Co., 128 Ala. 183, 29 South. 451, and Davis v. Williams, 121 Ala. 542, 25 South. 704, cited by counsel for complainant, refer to actions at law for damages for the breach of contracts. Of course, there are many contracts not specifically enforceable in equity which will afford an action at law for the breach of same. Nor do we consider the case of South & North R. R. Co. v. Highland Co., 98 Ala. 400, 13 South. 682, 39 Am. St. Rep. 74, which is an equity case, opposed to the opinion in the case at bar. The chancellor erred in not sustaining the motion to dismiss the bill for want of equity, and the decree of the chancery court is reversed, and one is here rendered dismissing the bill.

Reversed and rendered.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

VOSS v. CHAMBERLAIN et al.

(Supreme Court of Iowa. July 9, 1908.)

117 N. W. 269.

BILLS AND NOTES — BLANK INDORSEMENT — BONA FIDE HOLDER — PLEDGEE — "VALUE."

1. The signing by the payees of a note of a guaranty of payment combined with waiver of demand, notice, and protest constitutes the signers indorsers and not guarantors, and, where no indorsee is named, the subsequent delivery of the instrument to one who takes in due course and for value passes title.

2. A transferee who takes collateral by way of substitution for other collateral surrendered becomes a holder for a valuable consideration.

Digitized by Google

3. The Negotiable Instruments Act (Laws 1902, p. 86, c. 130, § 52; Code Supp. 1907, § 3060a52) provides that a holder in due course must be a holder for value. Section 191, p. 98 (section 3060a191), provides that the term "value" means valuable consideration. Section 25, p. 84 (section 3060a25), provides that an antecedent or pre-existing debt constitutes value. Held that, where one having possession of notes indorsed by the payees pledged them by way of substitution for other collateral held by the pledgee for antecedent indebtedness, the pledgee became a holder for value.

4. Code, § 3070, providing that a bona fide holder for value may not recover against the maker of negotiable paper a greater sum than the holder paid for the instrument if it was procured by fraud on the maker, has no reference to recovery on instruments as to which the maker has a defense; and hence, where one having the mere custody of notes indorsed by the payees wrongfully pledged them by way of substitution for other collateral held by the pledgee, but thereafter secured possession of the notes, and returned them to the payees, the recovery of the pledgee was not limited to the value of the security surrendered when the notes were accepted by way of substitution.

5. The rule that one who has personal property in his custody without any title cannot by delivery, even to a purchaser in good faith and for value, transfer title which will be valid as against the real owner who has not by any act of his conferred apparent authority to transfer title on the one having such apparent custody, while applicable not only to goods and chattels, but to instruments quasi negotiable in character representing property and intended to pass for it by delivery, such as bills of lading, is subject to an exception in case of current money and negotiable instruments payable to bearer, or indorsed in blank and coming into the hands of a holder in due course.

6. The Negotiable Instruments Act (Laws 1902, p. 87, c. 130, § 59; Code Supp. 1907, § 3060a59) provides that every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course, but that such rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. Held, that where one G., having the custody of notes indorsed by defendants, the payees, wrongfully pledged them to plaintiff by way of substitution for other collateral held by plaintiff as security for antecedent indebtedness of G., defendants could not overcome the presumption that plaintiff became the holder of the notes in due course without notice, by showing that the title of G. was defective; and to defeat the title of plaintiff defendants had the burden of proving want of good faith on the part of plaintiff in accepting the notes.

Appeal from District Court, Crawford County; Z. A. Church, Judge.

Action for damages for the conversion of certain promissory notes. On a trial to the court without a jury judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Mayne & Hazelton, for appellants. Shaw, Sims & Kuehnle, for appellee.

McCLAIN, J. In April, 1903, one H. S. Green, a banker at Dow City, Iowa, acting as agent for the defendants, effected a sale for them of a tract of land in Nebraska, receiving in payment a small sum in cash and certain promissory notes which were made payable to "E.

Digitized by Google

N. Chamberlain, Amos Weatherbee, and H. S. Green, or order." Green appropriated the cash payment and the proceeds of the first of the notes to become due in point of time which he collected to the payment of his commission, and turned over the other notes, of the face value of $4,350, to the defendant Chamberlain as the property of defendants, singing his name on the back of the notes to a stamped guaranty of payment, waiving demand, notice of non-payment, and protest. In November, 1903, defendant Chamberlain, intending to negotiate the notes, indorsed his own name, and had the name of his co-owner, Weatherbee, indorsed under the name of Green on the back, but, as the sale of the notes was not then effected, they were replaced among the private papers of Chamberlain, which were kept for safety in the Exchange Bank of Dow City, of which Green was owner. At some time between November, 1903, and March, 1904, these notes were pledged by H. S. Green to the Bank of Denison, of which C. L. Voss, the plaintiff, is cashier and L. M. Shaw and C. L. Kuehnle owners, by way of substitution for other collateral held by the Denison bank as security for antecedent indebtedness of H. S. Green to the extent of $6,175. On March 19, 1904, these notes were delivered by the Bank of Denison to H. S. Green, who in the receipt given therefor describes them as collateral, and promises that, if paid or sold, the proceeds will be applied by him in payment of his notes, and, if not paid or sold, they will be returned to the Bank of Denison by about April 10, 1904. On April 8, 1904, in pursuance of bankruptcy proceedings against H. S. Green, a receiver was appointed for the Exchange Bank of Dow City, and after that time the notes in question were found among the private papers of defendant Chamberlain, where they had been before they were pledged by Green to the Denison bank. It is clear from the evidence that without authority of defendants, who were the owners of these notes, Green, who had no interest therein or right to the custody thereof, abstracted them from the wallet in which Chamberlain kept them with other private papers in the Exchange Bank, and pledged them to the Denison bank as collateral security for his own indebtedness, and that subsequently, having obtained them from the Denison bank for the purpose of selling or collecting them or collecting interest as the agent of the Denison bank, he returned them to the wallet containing Chamberlain's private papers; neither Chamberlain nor Weatherbee having had any knowledge in the meantime that they had been abstracted and pledged to the Denison bank. It also appears that plaintiff Voss, as cashier of the Denison bank, accepted these notes from Green as collateral by way of substitution for other collateral surrendered without knowledge of any right thereto on the part of Chamberlain and Weatherbee, and in the belief that they were the property of Green. If the Bank of Denison became the holder of the notes in question as collateral security in due course, and for valuable consideration, it is entitled to recover the value of the notes as subsequently found in the possession of Chamberlain claiming to hold them as the property of Chamberlain and Weatherbee, and refusing to deliver them up on demand; for the delivery of the notes to Green for a specific purpose as the agent or custodian of the bank did not constitute a surrender of the lawful possession of such notes by the bank as the holder for value. Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245; Burley v.

Digitized by Google

Rose, 57 Iowa, 651, 11 N. W. 629; Clark v. Iselin, 21 Wall. (U. S.) 360, 22 L. Ed. 568; Jones, Pledges (2d ed.), §§40–48. If Green, having possession of the notes indorsed in blank, had transferred them to an innocent holder for value, such transferee would no doubt have acquired rights prior to those of the Bank of Denison; but this surreptitious return of the notes to the wallet containing the papers of defendant Chamberlain did not invest the defendants with any other rights than those which they had prior to the abstraction of the notes from the wallet by Green and their delivery to the Bank of Denison. The return of the notes to Chamberlain's possession without his knowledge, and without his having parted with any new consideration or voluntarily incurring any detriment, did not make the defendants new holders for value in due course.

The sole question to be determined, then, is whether by the original pledge of the notes by Green the Bank of Denison became holder thereof in due course for value and without notice of the wrongful act of Green in thus transferring paper to which in fact he had no title. The notes were not yet due at the time of their transfer by Green to the Bank of Denison, and the bank, therefore, took any rights which it acquired before maturity. But it is contended for appellants that it acqnired no rights whatever because the notes were payable to the persons named therein or order, and were not so indorsed, as that title would pass by delivery. As appears from the facts stated, the indorsement by Green when the notes were first procured by him and delivered to the defendants was by means of his signature to a guaranty of payment entered on the back of the notes with a waiver of demand, notice, and protest. The names of defendants were at a subsequent time written by them under the name of Green following this guaranty. If it were material to determine whether defendants indorsed the notes in blank, or merely joined with Green by the subsequent act in guarantying payment, it might be difficult to say whether they became blank indorsers or only guarantors. But, according to the weight of authority and the recent holding of this court, the signing of a guaranty of payment combined with waiver of demand, notice, and protest constitutes the signers of such an indorsement who are payees of the note indorsers and not guarantors, and, as no indorsee is named, such indorsement is a blank indorsement and the subsequent delivery of the instrument to one who takes in due course and for value passes title. German American Savings Bank v. Hanna, 124 Iowa, 374, 100 N. W. 57.

In determining whether the Bank of Denison became a holder for value, it is not necessary to consider the conflict in authorities as to whether a transfer as security for a preexisting debt constitutes the transferee a holder for value, for the evidence shows that the notes were delivered to the Bank of Denison by way of substitution for other collateral which was surrendered in the same transaction; and, beyond question, a transferee who thus takes collateral by way of substitution for other collateral surrendered becomes a holder for valuable consideration. Park Bank v. Watson, 42 N. Y. 490, 1 Am. Rep. 573; Greenwell v. Haydon, 78 Ky. 332, 39 Am. Rep. 234; Cherry v. Frost, 7 Lea (Tenn.) 1; Sawyer v. Turpin, 91 U. S. 114, 23 L. Ed. 235; 1 Daniel's Negotiable Instruments, § 827. Since the adoption in this state of the negotiable instruments act (Act 29th Gen. Assem.

Digitized by Google

[Laws 1902, p. 86] c. 130), there is no question, however, as to a holder who takes by way of security for pre-existing indebtedness being a holder for value. By section 52 of that act (Code Supp. 1907, § 3060a52) a holder in due course must be a holder "for value," and the term "value" means valuable consideration (section 191), and by section 25 it is declared that "an antecedent or pre-existing debt constitutes value." In no view of the case, therefore, can the Bank of Denison be said not to have been a holder for value.

In this connection it is contended, however, that, as the value of the collateral surrendered when the notes in question were accepted by the Bank of Denison is not shown, the bank is not entitled to recover because, under Code. § 3070, a bona fide holder for value may not recover as against the maker of negotiable paper a greater sum that the holder paid for the instrument if it has been procured by fraud upon such maker. This section evidently has reference, however, to recovery on instruments as to which the maker has a defense. The defendants in this action were not the makers of the notes which they are charged with having converted, nor are they sued as makers. There is no contention that any fraud was perpetrated upon the maker, and there is no occasion, therefore, to limit the recovery of plaintiff to the amount or value of the security surrendered when these notes were accepted by way of substitution. The indebtedness of Green to the Bank of Denison exceeds the amount of this collateral, and plaintiff is entitled to recover, therefore, if at all, in the full value of the notes converted. If the bank was holder in due course and free from defenses, it might enforce payment against the maker of the notes and the defendants as indorsers for the full amount thereof. See Negotiable Instruments Act (Acts 29th Gen. Assem. [Laws 1902, p. 87] c. 130) § 57; Code Supp. 1907, § 3060a57. And the amoun which the bank might have recovered on the notes had they not been converted by the defendants would be the measure of recovery against defendants for their unlawful conversion. The main contention for the appellant is that Green had no title to these notes when he transferred them to the Bank of Denison, and that the bank could not, therefore, acquire title or right thereto as against defendants, the lawful owners. The rule invoked is that applicable to personal property in general, that one who has such property in his custody, but without any title, as for instance a thief or the finder of lost goods, cannot by delivery even to a purchaser in good faith and for value transfer title which will be valid as against the real owner, who has only by any act of his conferred apparent authority to transfer title upon the one who has such apparent custody. This rule is applicable not only to goods and chattels, but to instruments quasi negotiable in character, representing property and intended to pass for it by delivery such as bills of lading. Shaw v. Railroad Co., 101 U. S. 557, 25 L. Ed. 892; McMahon v. Sloan, 12 Pa. 229, 51 Am. Dec. 601. But to this rule there is a distinct and universally recognized exception in case of current money and negotiable instruments payable to bearer or indorsed in blank which are considered as standing for and representing money, coming into the hands of a holder in due course; that is, before maturity for value and without notice of defect in the title. In such cases the title of the holder is not dependent upon that of the person from whom the money or instrument is obtained. This is, as said

Digitized by Google

by Lord Chief Justice Holt in 1 Salk. 126 (Anonymous), "by reason of the course of trade which creates a property in the assignee or bearer," and this reason is repeated by Lord Mansfield in Miller v. Race, 1 Burr. 452, with the suggestion that "the bearer is a more proper expression than assignee," and with the more explicit statement with reference to bank notes payable to bearer that "they are not goods, not securities nor documents for debts, nor are they so esteemed, but are treated as money, as cash in the ordinary course and transaction of business by the general consent of mankind which gives them the credit and currency of money to all intents and purposes." Lord Mansfield in the later case of Peacock v. Rhodes, 2 Douglas, 633, stated the law to be "well settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties;" and he continues; "I see no difference between a note indorsed blank and one payable to bearer. They both go by delivery and the possession proves property in both cases." And he adds with reference to the particular case under consideration that, as the jury had found that the bill indorsed in blank on which action was brought by a holder taking by delivery was received in course of trade, the case was clear that the holder could recover, although it had been stolen from a previous holder. In Miller v. Race, supra, Lord Mansfield further explains the rule with reference to bank bills payable to bearer, in answer to the suggestion that it was based on the lack of earmarks, which would limit it to money. "'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said that the reason why money cannot be followed is because it has no earmark; but this is not true. The true reason is upon account of the currency of it. It cannot be recovered after it has passed in currency. So in case of money stolen the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but before money has passed in currency an action may be brought for the money itself." This reasoning of Lord Mansfield has received unqualified approval both as to money and as to negotiable instruments payable to bearer or indorsed in blank. In Saltus v. Everett, 20 Wend. (N. Y.) 267, 277, 32 Am. Dec. 541, it is said: "A long series of decisions, beginning with Miller v. Rice, 1 Burr. 452, has so settled the law that possession of such paper is presumptive proof of property, and that he who received it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances." See, also, Murray v. Lardner, 2 Wall. (U. S.) 110, 118, 17 L. Ed. 857; Tucker v. New Hampshire Savings Bank, 58 N. H. 83, 42 Am. Rep. 580; 2 Randolph's Commercial Payer (2d Ed.), § 736; 1 Daniel's Negotiable Instruments, §§ 663, 729. If the bank took these notes in due course of business, its title was not affected by the fact that Green unlawfully abstracted them from the possession of defendants. Wheeler v. Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Greenwell v. Haydon,

Digitized by Google

78 Ky. 332, 39 Am. Rep. 234; Negotiable Instruments Act (Acts 29th Gen. Assem. [Laws 1902, pp. 86, 87], c. 130), §§ 56, 57; Code Supp. 1907, §§ 3060a56, 57.

It is argued, however, that plaintiffs did not show the Bank of Denison to be a holder in due course, because there was no competent evidence with reference to one of the owners of the bank that he had no notice of the want of right or authority on the part of Green to transfer the notes by delivery, and counsel rely upon cases of which McKnight v. Parsons, (Iowa) 113 N. W. 858, and Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805, are examples, holding that, as against a defense by the maker that the instrument was procured and negotiated through fraud or in breach of trust, the holder must affirmatively establish want of notice. But the cases thus relied upon are those in which it is held that, by reason of defective execution of the instrument itself or lack of assent on the part of the person sought to be charged as maker, it has not become a negotiable instrument to which the rules relating to indorsement and transfer are applicable. No such question arises in this case. The notes were fully executed and delivered as negotiable instruments to the defendants, and as such were held by them when they were abstracted from the possession of defendant Chamberlain and delivered by Green to the bank. The authorities already cited expressly negative any obligation on the part of the holder to prove diligence in ascertaining the right of the person in actual possession purporting to transfer title and charge the holder with the defective title of the person making the transfer only where bad faith is shown. In the United States there has been a continuing conflict of authority on this question. See 2 Randolph's Commercial Paper, §§ 996–1001; 2 Daniel's Negotiable Instruments, § 1680. This uncertainty in the law has been remedied by the adoption in this State of the negotiable instruments act by which it is provided in section 59 (Code Supp. 1907, § 3060a59), as follows: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Defendants cannot, therefore, overcome the presumption that the Bank of Denison became the holder of the notes in due course — that is, without notice — by showing that the title of Green to such notes was defective. In other words, to defeat the title of the bank, defendants have the burden of proving want of good faith on the part of the bank in accepting the notes from Green.

A rule often applied in deciding a controversy like this, between a holder of negotiable paper and a party who has given it apparent validity in the hands of one transferring it without right, is that, when one of two innocent persons must suffer by reason of the wrongful act of a third party, that one must bear the loss who made it possible for the third party to commit the wrong. It is not always easy to say whether in a particular case the one upon whom it is sought to cast the responsibility under this rule has done an act such as to charge him for the wrongdoing of another who has proceeded without

Digitized by Google

legal authority; but the case before us is one coming well within the rule as often applied. The defendants held these notes payable to the order of Green and themselves and indorsed by Green. In this condition the notes could not have been put in circulation so as to come into the haids of a holder in due course without notice. Defendants intentionally indorsed the notes with the purpose that they should be negotiated, and, although this purpose was not at the time carried out, they left the notes in this condition, apparently indorsed for negotiation and transfer by delivery, in the custody of the Exchange Bank of which Green was the owner and manager. By this act of placing the notes within the control of Green, they enabled him to make a transfer of them by delivery as owner, and to put the Bank of Denison in such condition as to suffer a loss without any fault on its part if the apparent title acquired by it from Green should be held defective. It has often been held that, under such circumstances, the rights of the holder are superior to those of the previous party who has made the transfer of the instrument practicable. Emerson v. Crocker, 5 N. H. 159; Tucker v. New Hampshire Savings Bank, 58 N. H. 83, 42 Am. Rep. 580; Cherry v. Frost, 7 Lea (Tenn.) 1. A motion of appellants submitted with the case to strike appellee's additional abstract from the files is overruled.

The judgment is affirmed.

TITLE GUARANTEE & TRUST CO. v. HAVEN et al.

(Supreme Court, Appellate Division, First Department. June 5, 1908.)

111 N. Y. S. 305.

BILLS AND NOTES — ACCEPTANCE — ESTOPPEL OF DRAWEE TO DENY GENUINENESS — FORGERY OF SIGNATURE OF DRAWER — BANKS AND BANKING — PAYMENT OF CHECKS — RECOVERY OF PAYMENT — MUNICIPAL CORPORATIONS — ASSESSMENTS FOR STREET IMPROVEMENTS — PAYMENT — VOLUNTARY PAYMENT — FORGED CHECK PAID BY BANK — SUBROGATION — MONEY PAID — RECOVERY.

1. It is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, as he is presumed to know the drawer's handwriting; and, if the drawee accepts or pays a bill to which the drawer's name has been forged, he can neither repudiate the acceptance, nor recover the money paid.

2. Under Negotiable Instruments Law, Laws 1897, p. 734, c. 612, § 112, a bank which pays a check purporting to be drawn on it by one of its depositors guarantees the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and, where such signature is forged, cannot recover back the amount from the person to whom it was paid, although the position of the parties to such person has not changed in any respect.

3. A check on plaintiff bank, purporting to be drawn by one of its depositors, for the amount of an assessment for street improvements on property of defendants which they had contracted to convey free of incumbrances, was delivered to the collector of assessments of the city in payment of the assessment, without defendants' request or knowledge, and the assessment was discharged of record. Defendants thereafter conveyed the property as provided in their contract, and received the

Digitized by Google

purchase price. Plaintiff paid the check and charged the amount to its depositor, but, on afterward discovering that the signature thereto was a forgery, restored the amount to the credit of the account. Held that, as plaintiff had no claim against the city for the amount of the check paid, it could not be subrogated to any right of the city, and was not entitled to subrogation to the lien of the assessment on the property or on the consideration received by defendants for the sale thereof.

4. As plaintiff's payment of the check was purely voluntary, and it was estopped from denying the signature of its depositor, it could acquire no rights thereby against the person to whom payment was made or any person interested in sustaining the payment as valid; and hence it could not recover the amount from defendants, although the effect of the payment was to discharge the lien of the assessment on their property.

Houghton and Laughlin, JJ., dissenting.

Appeal from judgment on report of referee.

Action by the Title Guarantee & Trust Company against Fanny Arnot Haven and another. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Argued before INGRAHAM, McLAUGHLIN, LAUGHLIN, HOUGHTON, and SCOTT, JJ.

Harold Swain, for appellant.

John Vernon Bouvier, Jr., for respondents.

INGRAHAM, J. The issues in this case were referred to a referee for trial, who made his report upon which judgment was entered, and the plaintiff appeals from that judgment upon the judgment roll.

There is no dispute, therefore, about the facts. The referee found that there was imposed upon certain lands described in the complaint which were owned by one Marianna A. Ogden, prior to September 28, 1904, an assessment by the city of New York for regulating and grading Aqueduct avenue from Lind avenue to Kingsbridge, which was entered and confirmed on August 5, 1903, amounting to $9,953.83 and interest thereon; that Marianna A. Ogden died on the 28th day of September, 1904, leaving a last will and testament by which she devised the said property to the defendants as tenants in common, the said premises then being subject to said assessment; that on November 22, 1902, these defendants entered into a contract to sell this property, free and clear of all liens and incumbrances, for $388,000; that on the 26th day of November, 1904, the plaintiff, a trust company, located in the city of New York, had on deposit with it to the credit of the estate of Andrew H. Green a sum of money in excess of $9,953.83, which deposit was subject to a check drawn by William O. Green, trustee; that on the 26th day of November, 1904, some person drew a check which was signed, "Estate of Andrew H. Green, William O . Green, Trustee," upon the plaintiff to the order of the collector of assesments and arrears of New York City for the sum of $9,953.83, and on the 28th day of November, 1904, delivered said check to said collector of assesments and arrears, with an additional sum for the interest thereon accrued in payment of said assessment and interest thereon, and that the said collector received the said check and additional sum in payment of the assessments, and

Digitized by Google

discharged the said assessments of record; that on or about November 28, 1904, the plaintiff paid the said check to the Twenty-third Ward Bank, in which it had been deposited to the credit of the chamberlain of the city of New York and charged the same to its depositor in account; that the plaintiff believed the signature of the drawer of the said check to be the genuine signature of the said William O. Green; that the check was not signed by William O. Green, and the signature thereto of William O. Green was a forgery; that on the 22d day of December, 1904, the defendants conveyed the lands mentioned in the complaint as provided for in its contract of November 22, 1904, to the vendees, and received from them the purchase price over and above the amount paid upon the execution of the contract, to wit, $349,200; and that on April 6, 1905, pursuant to a demand made upon it by the said William O. Green, the plaintiff restored to the credit of the said Green's deposit account the said sum of $9,953.83 paid by it on the faith of the said check. The referee found as a conclusion of law that the plaintiff, by the payment of the check, admitted the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; that, when it paid the check to the indorsee of the payee, it had no right to pursue and reclaim the money in the hands of the party to whom it paid it and which had changed its position in consequence of such payment; that the check before its payment had been applied in payment of assessments on land belonging to the defendants without the defendants' request or knowledge does not give the plaintiff any claim or subrogation to the lien of the assessments upon the land, or upon the consideration for the sale thereof received by the defendants from the purchasers thereof, nor to recover the money from the defendants; and directed judgment dismissing the complaint.

The substantial fact upon which the plaintiff claims relief is that the city of New York had a lien upon certain real property for an assessment for a street improvement; that in payment of that assessment the city received a check which purported to be drawn on the plaintiff by one of its depositors; that they presented that check to the plaintiff, who paid it. The plaintiff guaranteed when it paid the check the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument. Negotiable Instrument Law, Laws 1897, § 112, c. 612, p. 734. In Nat. Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, the rule was thus stated:

"For more than a century it has been held and decided, without question, that it is incumbent upon the drawee of a bill, to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and, if he accepts or pays a bill to which the drawer's name has ben forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid."

And, speaking of Price v. Neal, 3 Burrows, 1354, it was said:

"But as applied to the case of a bill to which the signature of the drawer is forged, accepted, or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterwards paid."

Digitized by Google

Applying this principle, the plaintiff, having paid the check, could not have recovered it back from the city of New York, or from the collectors of assessments and arrears, although the position of the parties to the person to whom the draft had been paid was not in any respect changed. As the plaintiff could make no claim against the city of New York, it could not well be subrogated to any right that the city had against a third person by way of subrogation. It was purely voluntary payment by the plaintiff, and, if the effect of it was to discharge taxes upon the defendant's property, the plaintiff could acquire no greater right against the owner of the property than he could have acquired if the owners of such property themselves had presented the check to the plaintiff and the plaintiff had paid the check. As against the defendants and all persons interested in the payment of the check, the plaintiff is estopped from denying the signature of its depositor of the check, and could acquire no rights against either the person to whom it was paid or any person having an interest in sustaining the payment of the check as a valid payment by the plaintiff to the person presenting it for payment and receiving payment thereof.

I think, therefore, the judgment appealed from must be affirmed, with costs.

McLAUGLIN and SCOTT, JJ., concur.

HOUGHTON, J. (dissenting). I think the plaintiff is entitled to recover upon the plain principle that by mistake it paid money to defendants' use.

Although the assessments upon the real property devised to the defendants were levied in the lifetime of the defendants' testator, they were for street improvements, and hence defendants could not demand that their testator's estate pay them. Matter of Hun, 144 N. Y. 472, 39 N. E. 376. The assessments were a lien on the real property devised, which the defendants alone were bound to pay or suffer the loss of their property. Some person, not disclosed, forged the name of one of plaintiff's depositors to a check payable to the city for the purpose of paying these assessments. The plaintiff paid the check under the mistaken belief that the purported signature of its depositor was genuine, and the assessments against defendants' lands were thus discharged. If the defendants themselves had forged the check, there would have been no doubt of plaintiff's right to recover. Money paid to the forger on a forged instrument can always be recovered back by the person paying it. Frank v. Lanier, 91 N. Y. 112; 2 Daniel, Neg. Inst., § 1369. One can adopt the unauthorized act of an agent in signing his name, and he can also adopt a forgery of his signature. Howard v. Duncan, 3 Lans. 174; 2 Daniel Neg. Inst., § 1352a. The plaintiff paid the money either by mistake, excusable or inexcusable, as the fact may be, or because it was induced to do so by fraud practiced by means of a forged check. The defendants cannot hold the benefit of the money paid by mistake if it was excusable, nor can they appropriate the fruits of the fraud without becoming liable. It seems to me that Hathaway v. County of Delaware, 185 N. Y. 368, 78 N. E. 153, is conclusive authority upon defendants' liability. In that case a former county treasurer

Digitized by Google

was indebted to the county, and by a forged note he induced the plaintiff to pay his indebtedness, and it was held that the county must restore the money. In the present case, by means of a forged check, a lien upon defendants' property was paid and satisfied.

Section 112 of the negotiable instrument law, upon which the referee based his decision, has nothing to do with the question. Of course, the plaintiff could not recover the money back from an innocent holder of the check. It could recover it, however, from the forger, or one who adopts the forger's acts or accepts the benefit of the forgery.

The form of the action is misconceived. The plaintiff could not be subrogated to the rights of the city. The complaint, however, states all the facts, and, in addition to subrogation, asks that it be adjudged that the defendants pay as for money had and received to their benefit. The action was decided on a wholly erroneous theory, and without passing upon the question as to whether or not the plaintiff was so negligent in making the payment that it cannot recover.

In my view the judgment should be reversed and a new trial granted.

LAUGHLIN, J., concurs.

STATE v. HAMMELSY.

Supreme Court of Oregon. July 28, 1908.)

96 Pac. 865.

FALSE PRETENSES — DEFINITION — "OBTAINING MONEY OR PROPERTY BY FALSE PRETENSES" — BILLS AND NOTES — "CHECK" DEFINED — FRAUDULENT CHECKS.

1. A false pretense is a representation of some fact or circumstance, calculated to mislead, which is not true.

2. The gist of the statutory offense of obtaining money or property by false pretenses is obtaining money or property from another by deceit, fraudulently and feloniously superinduced by the beneficiary; and, when one by his acts intentionally creates a false belief, with intent to deprive another of his property, and does so, it is immaterial to his guilt whether such belief is induced by words or acts, or both.

3. A check is an order on a bank purporting to be drawn upon a deposit of funds.

4. Under B. & C. Comp., § 4463, providing that by drawing a check the drawer engages that it will be paid on presentation, when a check is given with the fraudulent and felonious purpose of obtaining another's property, with knowledge of the drawer that he has neither money nor credit at the bank, and that the check will not be paid, he is guilty of obtaining money by false pretenses, though he makes no other representation in reference thereto.

Appeal from Circuit Court, Jackson County; H. K. Hanna, Judge.

G. L. Hammelsy was indicted for obtaining money by false pretenses, and the State appeals from a judgment sustaining a demurrer to the indictment. Reversed.

A. M. Crawford, Attorney-General for the state.

Digitized by Google

BEAN, C. J. The defendant was indicted for obtaining money by false pretenses, the false pretense being a check, drawn by himself to his order on a bank, which he indorsed, and fraudulently and feloniously presented and delivered to one Orr, with intent to defraud, knowing at the time that he had no funds in the bank for payment of such check, and that it was worthless. A demurrer to the indictment was sustained, on the ground that it does not allege that any false or deceitful means were used by defendant to induce Orr to accept the check, such as representing that he had money or credit at the bank, or that it would be paid on presentation, or the like. In support of the ruling it is argued that the mere drawing and passing of a check on a bank in which the drawer has no funds or credit is not a false pretense, although it may be done for the purpose of fraudulently obtaining property or money from another, and with the knowledge of the drawer that the check is worthless and will not be paid. A false pretense is a "representation of some fact or circumstance, calculated to mislead, which is not true" (Anderson's Law Dict., p. 808); or, as Mr. Bishop defines it, "a false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value" (2 Bishop's Crim. Law, § 415). The pretense need not be in words, but may be implied from the acts of the party. The gist of the offense, against which the statute is directed, is obtaining money or property of another by deceit, fraudulently and feloniously superinduced by the beneficiary; and, when one by his acts intentionally creates a belief, as to an existing fact, which is false, with the intent to deprive another of his property, and does so, it cannot matter whether the erroneous belief was induced by words or acts, or both. Mr. Wharton (2 Wharton, Crim. Law [9th Ed.], § 1170) says "the conduct and acts of a party will be sufficient, without any verbal assertion." He cites several cases in support of the text, among which is that of a person who assumed the garb of an Oxford student, and by such garb and his conduct represented himself to be a student of the University, and so obtained funds. It was held that the false pretense was complete, although not a word passed as to his status. So, also, it was held to be a false prentense when a prisoner obtained money from an officer of a post office by indorsing and presenting to her, for payment, an order in favor of another person, although he did not make any false declaration or assertion to obtain the money. Rex. v. Story, R. R. C. C. 80. And, again, the offering of a worthless bill in satisfaction of an obligation is within a statute providing for the punishment of any one who, by false pretense, with intent to commit a fraud, obtains the property or money of another, although no representations are made as to the value of the bill. Commonwealth v. Beckett, 119 Ky. 817, 84 S. W. 758, 68 L. R. A. 638, 115 Am. St. Rep. 285. In ruling upon this case the court said that the mere offering of the bill in payment of the obligation "amounts to an assertion or representation by conduct, which may be as efficacious to convey an idea, or to constitute the basis of a reasonable belief, as though exact and appropriate words had been used. Words are used to express ideas. Signs might be used instead. Conduct that conveys necessarily the same idea,

Digitized by Google

and intended to do so, is, by a substitute for the words or signs, expressive of it. We have no doubt but that the use of a worthless bill, pretending it is valid, and with the intent to defraud, is a false token under the statute."

Now a check is an order on a bank purporting to be drawn upon a deposit of funds, and the drawer engages that on presentation it will be paid. B. & C. Comp., § 4463. The giving of such an instrument is therefore as much of a representation that the drawer has money or credit with the bank as if he had made an oral statement or declaration to that effect. And when the check is given with the fraudulent and felonious purpose of obtaining the property of another, with knowledge of the drawer that he has neither money nor credit at the bank, and that the check will not be paid, it is within the statute, although the drawer made no other representation in reference thereto. It was so ruled in the early case of Rex v. Jackson, 3 Campbell, 370. And the doctrine has been approved by the courts and text-writers, and it is generally agreed that it is not necessary that the drawer should have told the person to whom he gave the check that he had funds or credit in the bank. 12 A. & E. Ency. (2d Ed.) 838; Rapalje on Larceny, § 402; 2 Wharton on Crim. Law, § 2107; McClain on Crim. Law, § 674; Underhill on Crim. Evidence, § 444; People v. Donaldson, 70 Cal. 116, 11 Pac. 681; People v. Wasservogle, 77 Cal. 173, 19 Pac. 270; Commonwealth v. Drew, 19 Pick. (Mass.) 179; note to Barton v. People, 25 Am. St. Rep. 375–380. The Texas cases, Ayers v. State, 37 Tex. Cr. R. 1, 38 S. W. 792; Brown v. State, 37 Tex. Cr. R. 104, 38 S. W. 1008, 66 Am. St, Rep. 794, and Blackwell v. State, 41 Tex. Cr. R. 104. 51 S. W. 919, 96 Am. St. Rep. 778, which apparently hold a contrary doctrine, are under a statute different from ours, and in the construction of which the courts of that state hold that, before a defendant can be convicted, there must be a distinct and certain representation of an existing fact, and the indictment must show such certain and distinct representation of the fact, either past or present. Martin v. State, 36 Tex. Cr. R. 125, 35 S. W. 976. From our examination of the question we are constrained to believe that the court below was in error in sustaining the demurrer.

Judgment reversed.

ONSTOTT v. OGLE et al.

(Supreme Court of Illinois. April 23, 1908. Rehearing denied June 4, 1908.)

84 N. E. 1059.

PARTNERSHIP — PROVISIONS FOR DISSOLUTION IN PARTNERSHIP AGREEMENT — WITHDRAWAL OF PARTNER.

1. A partnership agreement that if either of certain of the partners wished to retire at the end of any year the remaining partners would return the amount he had paid in as part payment for his interest, etc., and requiring notice of withdrawal of at least ten days, reserved the right to such partners to voluntarily dissolve the partnership, without cause, by withdrawal, notwithstanding a provision that the partnership should continue for five years, that provision being a limitation fixed for the duration of the contract if no one withdrew before the limitation expired.

Digitized by Google

2. Where, under a partnership agreement providing that if a partner chose to withdraw, his interest was to be purchased by the other partners, he did withdraw, and they offered to purchase his interest, proposing to pay therefor the amount specified in the agreement, his withdrawal dissolved the partnership, entitling him to an acounting.

Appeal from Appellate Court, First District, on appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Bill by James L. Onstott against A. M. Ogle and others. From a judgment of the Appellate Court reversing a decree of the superior court for complainant and remanding the cause, complainant appeals. Judgmen of the Appellate Court reversed, and decree of the Superior Court affirmed.

This is an appeal from the judgment of the Appellate Court for the First District reversing and remanding, with directions, a decree of the Superior Court of Cook county rendered upon a bill for an accounting among partners. James L. Onstott filed a bill for an accounting against his associates in business, and upon a hearing the Superior Court rendered a decree in his favor for $5,568.48. Upon an appeal by the defendants below to the Appellate Court a judgment was rendered finding that Onstott was only entitled to $1,257.28 due him on account of salary and money paid out for the firm. The judgment of the Appellate Court denied Onstott any right to an accounting or any interest in the profits of the business which had been made while Onstott was a member of the firm. By the judgment of the Appellate Court the decree below was reversed and the cause remanded with directions to enter a decree in accordanc with the views expressed by the Appellate Court. The judgment of the Appellate Court being final, Onstott brings the case to this court by appeal.

The contract creating the copartnership in question is set out in the bill. The purpose of the copartnership was to conduct a retail coal business in Chicago. Comley Ogle, who had been the owner of a one-fourth interest in the business, disposed of his interest to other members of the firm. James L. Onstott, complainant in the bill, had been the manager of the business for said firm. Onstott and one Tandy desiring to become interested in the business, joined with A. M. Ogle and Willard W. Hubbard, and A. M. Ogle, trustee for the Island Coal Company, in the formation of a new copartnership created by articles of agreement as follows:

"Therefore this agreement of partnership, entered into this first day of February, 1900, by and between A. M. Ogle, W. W. Hubbard, each owning a one-eighth interest in the said business; J. L. Onstott, owning a one-fourth interest in the said business; A. M. Ogle, trustee for the Island Coal Company, owning a one-fourth interest in the said business; and A. O. Tandy, owning a one-fourth interest in the said business. Witnesseth: The above parties agree to carry on a coal business at the corner of Maplewood avenue and Fulton street, Chicago, under the name of Ogle, Hubbard & Co., for a period of five years from July 1, 1899. It is mutually agreed James L. Onstott shall be the manager of the said business so long as his services are satisfactory to the other parties in interest, at a salary which shall be determined as follows: For the year ending May 1, 1900, said salary shall be $1,000, and for the months of May and June, 1900, said salary

Digitized by Google

shall be $100 per month, and for each succeeding year after July 1, 1900, said salary shall be one-fifth of the net profits as determined by the annual statement made on the 30th day of June each year, but in no year shall said salary be less than $1,200. . . . It is agreed by and between the parties hereto that if either said Onstott or Tandy wishes to retire from the business at the end of any year, the remaining partners will return to him the amount of cash he shall have paid in up to that date as part payment for said interest, and shall return to him any unpaid notes that he may have given in part payment for said interest, but no interest is to be paid upon the principal that he may have advanced for such purpose. It is also agreed that such notice of withdrawal must be made in writing to each of the other members of the firm at least ten days before the 30th of June, which shall be deemed to be the end of the business year. A list of the accounts and bills receivable and a list of the accounts and bills payable, as they were shown on the books of the company on June 1, 1899, are hereto attached to this agreement and made a part thereof.

"And it is mutually agreed between A. M. Ogle and W. W. Hubbard and the Island Coal Company, as one party hereto, and A. O. Tandy and J. L. Onstott as a party hereto, that the interests purchased by said Onstott and Tandy shall not suffer any loss by reason of the bills and accounts receivable and the cash on hand July 1, 1899, being less in value than the lists of bills and accounts payable July 1, 1899; and in the event that the collections of said bills and accounts receivable and cash on hand amount to a less amount than the bills and accounts payable, as aforesaid, the said Ogle and Hubbard and the Island Coal Company agree to reimburse said Tandy and said Onstott, each, to the extent of one-fourth of said deficiency, said reimbursement to be made on their final payment for their interests in said business and to be of date of July 1, 1899. On or before the 30th day of June of each year a careful inventory and statement of the business of the company for the preceding year shall be taken, and such part of the profits (if there are any) for the preceding year as may be agreed upon shall be divided between owners of said business in proportion to their holdings, and in case said inventory and statement should show loss for the preceding year, said loss shall be charged against each interest in like proportionate manner. . . . The said A. M. Ogle, W. W. Hubbard, A. M. Ogle, trustee for the Island Coal Company, hereby agree that they will not withdraw from this partnership during its existence without the consent of said A. O. Tandy and J. L. Onstott, so long as said Tandy and Onstott are members of the firm. This agreement supersedes, cancels, and renders void any agreement of partnership heretofore entered into by and between any of the parties hereto.

"In witness whereof we have hereunto set our hands and seals this 1st day of February, 1900.

"A. M. Ogle,
"W. W. Hubbard,
"J. L. Onstott,
"Island Coal Co.,
"By A. M. Ogle, Trustee.
"Alfred O. Tandy."

Digitized by Google

In accordance with one of the provisions of the contract, James L. Onstott on June 9, 1903, served notice on the other members of the firm that he would withdraw from the firm on June 30, 1903. Pursuant to this notice Onstott withdrew from the firm on June 30, 1903, whereupon a dispute arose upon the question of the division of profits, and complainant filed this bill to compel an accounting.

Goodrich, Vincent & Bradley (Joseph M. Griffen, of counsel), for appellant. Musgrave, Vroman & Lee and Charles E. Barrett, for appellees.

VICKERS, J. (after stating the facts as above). Appellant's contention is that his action in withdrawing from the firm on June 30, 1903, amounted to a dissolution of the co-partnership, which he contends carries with it the right to an accounting, including the division of the profits to that date. Appellees insist that while he had the right to withdraw from the firm, yet his action in so doing did not amount to a dissolution of the co-partnership, and that because he withdrew before the expiration of the five-year period mentioned in the contract he lost his right to such participation in the profits.

We do not find it necessary at this time to determine whether one partner may voluntarily dissolve a partnership without cause when the right so to do is not provided for in the contract. That right, we think, is clearly reserved in the contract here under consideration by the following clause: "It is agreed by and between the parties hereto that if either said Onstott or Tandy wishes to retire from the business at the end of any year, the remaining partners will return to him the amount of cash he shall have paid in up to that date as part payment of said interest, and shall return to him any unpaid notes that he may have given in part payment for said interest, but no interest is to be paid upon the principal that he may have advanced for such purpose. It is also agreed that such notice of withdrawal must be made in writing to each of the other members of the firm at least ten days before the 30th of June, which shall be deemed to be the end of the business year." It is admitted that Onstott complied with this provision in the contract by giving notice and exercising his right of withdrawal at the time specified. It is true, there was a provision that the partnership should continue for a period of five years, but we regard this as a limitation fixed for the duration of the contract in case no one withdrew before the limitation expired. There are provisions in the contract whereby others might withdraw. It is obvious from the above stipulation that Onstott had the right, under the contract, to withdraw in the way and at the time he did.

It is contended that the withdrawal of Onstott from the firm did not work a dissolution of the partnership. To this proposition we cannot agree. In McCall v. Moss, 112 Ill. 493, this court, in passing upon the case, used the following language (page 501): "We understand the rule to be, that when one partner dies, or sells his interest to another, or a new member is admitted by purchase of a portion of the capital owned by one or more members of the firm, such will, in law, work a dissolution of the firm. Parsons on Partnership (page 406, § 1) states the law as follows: 'It may now be considered as a settled rule of the law of partnership, in England and in this country,

Digitized by Google

that the retirement of one partner from a firm consisting of any number of persons operates as a dissolution of that firm. . . . We suppose the truth to be that if a partner retires, whether by voluntary act, bankruptcy, expulsion, or death, or if a new partner comes in by any means whatever, in either of these cases the old partnership ceases to exist.'" See, also, Edens v. Williams, 36 Ill. 252, and, for a later case, Pease v. Dawson, 197 Ill. 340, 64 N. E. 366. In this case the contract provided that in case Onstott chose to withdraw his interest was to be purchased by the other members of the firm. He did withdraw, and they offered to purchase his said interest, proposing to pay therefor the amount specified in the contract. Onstott's withdrawal evidently dissolved the partnership, and the partnership being dissolved he was entitled to an accounting, and it was proper to include in the accounting a division of the profits up to June 30, 1903. The amount of the decree is not involved.

The judgment of the Appellate Court is therefore reversed, and the decree of the Superior Court of Cook county is affirmed.

Judgment reversed.

KESSLER et al. v. ARMSTRONG CORK CO.

(158 Fed. 744.)

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 3.

BILLS AND NOTES — FOREIGN EXCHANGE — WHAT LAW GOVERNS — DRAFTS DRAWN IN SETS — JUDGMENT — FOREIGN JUDGMENTS — RES JUDICATA — MERITS — CONCLUSIVENESS — COURTS — DECISIONS AS PRECEDENTS — LAWS OF FOREIGN COUNTRIES — PROOF — JUDGMENTS — PARTIES — FINDINGS — CONSTRUCTION — "ORDINARY COURSE OF BUSINESS — FOREIGN LAW — FOREIGN BILLS — FORGED INDORSEMENT — PAYMENT — NEGLIGENCE.

1. Where drafts were payable at Paris, the law of France determined what constituted payment.

2. Where two sets of drafts, original and duplicate, were drawn by New York bankers on a bank in Paris, the duplicate to be paid only in case the original was unpaid, the two sets constituted in law but one draft, so that when the holder produced the duplicates duly protested, with notice of demand given, he made out a prima facie case, as no duty devolved on him to account for the originals, payment of which was a matter of affirmative defense.

3. The original of a set of drafts was indorsed by the payee when it was stolen, and paid under a forged indorsement of the name of the indorsee. The duplicate, having been similarly indorsed by the payee, was received by the indorsee, and, on payment being refused because of the payment of the original, suit was brought against the drawee by the indorsee, in which judgment was rendered against him on the ground that since his name was not on the original he had no standing to criticise the payment thereof, and that the payee was discharged by the law of France where the draft was payable by the payment of the originals, and that the claim was therefore dismissed "entirely," and "as in all respects inadmissible and ill founded." Held, that such judgment was not a mere dismissal on the ground that the indorsee had no standing alone, the second ground being treated as obiter,

Digitized by Google

but that the decision should be considered as resting on both grounds, and was therefore a judgment on the merits.

4. Where a judgment of the French court dismissing a suit by an indorsee of a bill of exchange against the drawee was on the merits, it was not subject to re-examination in a suit in the federal courts of the United States by the payee against the drawer, in the absence of proof of fraud or want of jurisdiction of the French court, or that France so treats the judgments of the courts of the United States, but plaintiff, if bound by such French judgment at all, was estopped to question its grounds either in law or fact.

5. A finding of the French law with reference to the conclusiveness of the judgments of American courts is not binding on different parties to another action involving the same question, it being necessary that the foreign law be proved in every case as a fact.

6. The indorsee of a bill drawn on bankers in France sued them on a duplicate of the set, the original having been paid under a forged indorsement, in which action a judgment was rendered against the indorsee, whereupon the payee took up the duplicates from the indorsee and sued the drawers in the federal court of the United States, who pleaded payment of the originals in defense. Held that, since neither the drawers nor the payee were parties or privies to the French judgment, it was not conclusive against the payee that the payment ot the original by the drawee was sufficient to discharge the bills.

7. In an action in France on a foreign bill by the indorsee against the drawee, the original of which the latter had paid under a forged indorsement, the court found that the drawee made such payment in the ordinary course of business over the counter, and without notice that the original bills had been lost, and without opposition or objection to such payments, and that there was no evidence that the payments were made in bad faith. Held, that the use of the phrase "paid in the ordinary course of business" construed with the balance of the finding merely meant that payment was made to the holder of the original drafts against their surrender at the drawee's bank on a business day, in banking hours, in the same way it usually paid drafts, and was insufficient to exclude an inference of negligence in the drawees, arising from their failure to detect a variance in the indorsement which was forged.

8. A foreign judgment against an indorsee of a foreign bill of exchange, in an action against the drawee holding that the latter was discharged by a payment of the original under a forged indorsement, was not conclusive evidence of the law of France, as applied to the facts that the drawee was not negligent in paying the bill as to persons who were neither parties nor privies to such judgment.

9. Evidence held to justify a finding that the failure of the drawee of a bill payable in France to observe that the chain of indorsement was broken by an indorsement which obviously did not correspond to the name called for in the prior indorsement, and which was in fact a forgery, was such negligence as to deprive the drawee under the French law of the protection of the French Code de Commerce, article 145, providing that a party who pays a bill of exchange at maturity without receiving notice of opposition [objection] is presumed to be legally discharged.

Noyes, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Southern District of New York.

William G. Guthrie, E. C. Henderson, and Joseph P. Cotton, Jr., for plaintiffs in error. Herbert Noble and Jackson & Hubbard (Hartwell P. Heath, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

Digitized by Google

WARD, Circuit Judge. Kessler & Co., bankers of New York city, drew two sets of drafts, original and duplicate, one only to be paid, to the order of the Armstrong Cork Company on a bank in Paris, and put the bank in funds to pay the same. The Cork Company sent the original by mail, duly indorsed, to the order of Matas Hermanos, but the same were stolen, and presented to the drawee with a forged indorsement in the name of Mata Hermanos, omitting the final "s" in Matas, to the order of B. Lauriez. The drawee paid the person presenting the drafts, who was unknown to it, and who was not B. Lauriez. By another mail the Cork Company sent the duplicates to Matas Hermanos, and the same duly indorsed having been presented to the drawee on behalf of Hijos de G. Matas payment was refused on the ground that the originals had been paid.

By the law of France, when the drawer has put the drawee in funds the latter becomes the principal debtor, and may be sued directly by the holder. Accordingly, Hijos de G. Matas brought suit against the drawee in the Tribunal de Commerce of the Seine, a court of competent jurisdiction, in which it was so proceeded that the court on two grounds, viz., that Hijos de G. Matas, not being on the original drafts, had no standing to criticise the payment thereof, and on the further ground that the payee was discharged by the law of France by the payment of the originals, dismissed the claim "entirely," and "as in all respects inadmissible and ill founded." The Cork Company, payee of the drafts, then took up the duplicates from Hijos de G. Matas, and brought the present suit against Kessler & Co., the drawers, who pleaded payment of the originals in defense. As the drafts were payable at Paris, the law of France determined what constituted payment.

At the trial each party moved for a direction, and the trial judge held that the French judgment under the case of Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, was not conclusive; that the drawee was guilty of negligence in paying the originals without observing that the chain of indorsements was broken by omission of the final "s" from the word "Matas," and directed a verdict for the plaintiff, to which Kessler & Co., the defendants, duly excepted. The two sets of drafts are in law to be regarded as but one, and when the plaintiff produced the duplicates duly protested with notice of demand given, it made out a prima facie case. No duty lay upon it to account for the originals. If the originals had been paid, that fact was a defense to be affirmatively proved by the defendants. Downes v. Church, 13 Pet. 286, 10 L. Ed. 127. The defendants sought to prove payment by offering the French judgment in evidence, against which the plaintiff made various objections.

First it said that it was merely a dismissal on the ground that Hijos de G. Matas had no standing, and therefore that it was not a decision on the merits. We cannot agree to this, because the court expressly rested its judgment, not only on the ground that the plaintiffs had no standing, but likewise on the ground that the drawee had discharged its liability by payment of the originals, all the charges of negligence against it having been considered by the court. Because either ground would have been sufficient without the other, we do not think that one must be held to be obiter dictum. The Supreme Court,

Digitized by Google

speaking by Brewer, J., of one of its earlier decisions which was rested, not simply on the contracts between the parties involved in the case which only had been discussed in the court below, but also on a statutory obligation which the court itself for the first time suggested, refused to consider the latter ground as obiter, saying:

"We are unable to yield our assent to these contentions. While the claim of the plaintiffs in that case was founded directly upon the contracts, yet, if there were a statutory duty to let them into the joint use of the bridge and its approaches, that was enough to sustain a decree in their favor, and the contracts might be regarded as simply relieving the court of the work of settling minor matters, such as method of use, compensation therefor, and matter of control. Indeed, the alleged invalidity of the contracts was rested largely on the scope of the statutes, and the duties to the government and the public imposed thereby on the railroad company. Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum. Railroad Companies v. Schutte, 103 U. S. 118, 143, 26 L. Ed. 327, in which this court said: 'It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here, the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.'" Union Pacific R. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 165, 26 Sup. Ct. 19, 20, 50 L. Ed. 134.

The plaintiff further objected that the French judgment, even if on the merits, was prima facie proof only, and could be re-examined to the bottom, but this it not so in the absence of proof of want of jurisdiction, of fraud, or that France so treats the judgments of our courts. Gray, J., summed up the law in the Hilton case at page 202 of 159 U. S., page 158, 16 Sup. Ct., 40 L. Ed. 95, as follows:

"In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that where there has been opportunity for full and fair trial abroad before a court of competent jurisdiction conducting a trial upon regular proceeding after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal upon the mere assertion of the party that the judgment was erroneous in law or in fact."

Digitized by Google

Applying this to the case in hand, the plaintiff, if bound by the judgment at all, was prevented from questioning its correctness either in point of law or of fact. In the Hilton case the defendant pleaded and offered to prove that the French courts treated the judgments of our courts as prima facie evidence only, and re-examined them to the bottom on the merits. The trial judge having excluded this proof, the Supreme Court reversed the judgment on the ground that if such a situation were proved, our courts would not be bound in comity to treat French judgments in any different way. But in the present case there was no offer to prove the French law on the subject of foreign judgments, it being apparently supposed that what had been said by the Supreme Court in the Hilton case was sufficient evidence of it. But in that case not only was the French law not proved, but the judgment was reversed because such proof had been excluded. And even if the French law had been proved, a finding of it in that case would not be binding on the parties to any other action involving the same question, because foreign law must be proved in every case as a fact.

The plaintiffs finally objected that neither Kessler & Co. nor the Cork Company were privies to the French judgment. Of course, payment by the drawee, who is the principal debtor, would discharge all the other parties to the drafts secondarily liable. Such payment would be a defense to one sued as secondarily liable, like Kessler & Co. in this case, by a subsequent holder, like the Cork Company. But the defense cannot be proved by the judgment in favor of the drawee in the action between it and Hijos de G. Matas because neither Kessler & Co. nor the Cork Company were parties or privies to the judgment. There are a number of authorities to the contrary, as may be seen cited in 23 Cyc. 1266. Levi v. McCraney, Morris (Iowa) 124; Durham v. Giles, 52 Me. 206; Hackleman v. Harrison, 50 Ind. 156; Leslie v. Bonté, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62. They proceed largely upon the theory that it would be very unreasonable to expose the principal debtor, after he had been discharged in a suit by one holder, to successive suits by all prior holders on the same grounds, which might result in different judgments in different actions. However, the law of the federal courts, which is binding upon us, is very clearly stated in Railroad Co. v. National Bank, 102 U. S. 14, 26 L. Ed. 61. In that case the railroad company had issued a note for $5,000 payable to its own order, and indorsed by Palmer & Co. as accommodation indorsers, which finally came, through Hutchinson & Ingersoll, into the hands of the bank as collateral security for a prior indebtedness of Hutchinson & Ingersoll. The bank sued Palmer & Co. in the Supreme Court of New York, where judgment was rendered in favor of the bank for $601, apparently an amount due from the railroad company to Hutchinson & Ingersoll. Subsequently, the bank brought suit in the Circuit Court of the United States against the railroad company, and recovered judgment for the full amount of the note less what it had recovered from Hutchinson & Ingersoll. The difference between these two judgments was due to the difference between the law of New York under Coddington v. Bay, 20 Johns. 637, 11 Am. Dec. 342, and of the federal courts under Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, the former

Digitized by Google

holding a pre-existing debt not to be a sufficient consideration to enable a holder to recover on a note not valid between the parties, whereas the latter regarded a pre-existing debt to be as effective a consideration as a new payment in excluding all equities of prior parties. Harlan, J., said:

"The first proposition of the plaintiff in error is that there has been a final determination by a court of competent jurisdiction between the same parties or their privies upon the same subject-matter as that here in controversy. This contention rests upon the judgment of the Supreme Court of New York, in an action instituted by the bank against Palmer & Co., as the indorsers of the note in suit. The judgment in the State court clearly constitutes no bar to the present action. Personal judgments bind only parties and their privies. The railroad company was not a party to the separate action against Palmer & Co., nor did it receive notice from the latter of the pendency of that suit. It was, therefore, in no manner affected by the judgment. Had the company received such notice in due time, it would, perhaps, although not technically a party to the record, have been estopped, at least as between it and its accommodation indorsers, from saying that the latter were not bound to pay the judgment, if obtained without fraud or collusion. Being, however, an entire stranger to the record, it had no opportunity or right in that proceeding to controvert the claim of the bank, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. If, in the action against Palmer & Co., the bank had obtained judgment for the full amount of the note, and, being unable to collect it, had sued the railroad company, the latter would not have been precluded by the judgment in that action, to which it was not a party, and of the pendency of which it had not been notified, from asserting any defense it might have against the note. This being so, it results that the company cannot plead the judgment in the State court as a bar to this action. An estoppel arising out of the judgment of a court of competent jurisdiction is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of the parties, as his interest may happen to require. The liability of the makers and indorsers was not joint, but several, and therefore a judgment in an action against the indorsers, upon the contract of indorsement, could not bar a separate action by the bank against the maker — certainly not where the maker was without notice from the indorsers of the pendency of the action against him."

This brings us to the last question in the case, namely, what was the legal effect under the law of France of what the drawee did?

The parties have entered into an agreed statement of fact which contains, among other things, photographic copies of the drafts and the indorsements thereon; a statement that the drawee paid the drafts to an unknown person; that the indorsement "Mata Hermanos" was a forgery; that the drawee "made said payments in the ordinary course of business and over the counter and without notice that such original bills had been lost, and without opposition or objection to such payments: and there is no evidence that such payments were made in bad faith;" and a translation of the French judgment and

Digitized by Google

of extracts from the French Code de Commerce referred to in said judgment. The defendants contend that the finding that the drafts had been "paid in the ordinary course of business" excludes any inference of negligence in the drawees. We cannot agree to this. The phrase must be read in connection with the rest of the agreed statement of facts. So read, it obviously means that the drawee paid the holder of the original drafts against their surrender at its bank on a business day, in banking hours, in the same way it usually paid drafts. The phrase should not be taken to deprive the other facts agreed upon of all significance; for example, that the indorsement of Mata Hermanos was obviously defective in omitting the letter "s," and that the person to whom the drafts were paid was unknown to the drawee.

The defendants further contend that even if the parties to this suit were not parties or privies to the French judgment, still it is conclusive evidence of the law of France applying to the facts of the case. They refer us to and quote from a number of cases, no one of which we think justifies the extreme position taken. The language used by the judges must be read in connection with the facts in each case. No foreign judgment was involved in Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289; Mutual Reserve Association v. Phelps, 190 U. S. 156, 23 Sup. Ct. 707, 47 L. Ed. 987, or Cahen v. Brewster, 203 U .S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310. The opinions delivered simply laid down the rule that the courts of another State or nation must be supposed to know their own law, and that their law is to be found in their decisions. In Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525, a foreign judgment was involved, and the question was whether the court had jurisdiction of one of the parties to it. This depended upon whether by the practice of New Jersey it was necessary to serve a subpœna in the case of a supplemental bill. There was no statute nor any decision of the Supreme Court of the State on the subject, and the court had to determine the law either by adopting the action of the chancellor in entering the decree against the party in question, or by adopting the opinion of a New Jersey lawyer, who thought that, no subpœna having been served, there was no jurisdiction of him. The court adopted the law as declared by the chancellor. In Donglioni v. Crispin, L. R. 1 H. L. 314, the parties to the action were actual parties to the foreign judgment in question. In Messina v. Petrococchino, 4 P. C. App. 144, the foreign judgment was in rem binding upon all the world. In Dent v. Smith, 4 Queen's Bench, 464, the court said it had no concern with the correctness or incorrectness of the judgment of a Russian consular court, the only question being whether the plaintiff had been thereby compelled to pay the money which he was seeking to recover as a loss under a policy of marine insurance. In Carr v. Francis Times & Company, [1902]. A. C. 176, a proclamation of the Sultan of Muscat authorized certain seizures within the territory of Muscat, and it was held to be a defense against the plaintiff's claim. None of these cases shows that the French judgment is to be regarded as more than evidence of the French law.

Article 145 of the Code de Commerce provides:

"A party who pays the bill of exchange at maturity, and without

Digitized by Google

receiving notice of opposition (objection) to the payment, is presumed to be legally discharged."

If this presumption is a violent one, then, evidently, under the agreed statement of facts that the drawee did pay "without opposition or objection to such payments" it is discharged as principal debtor, and so are Kessler & Co. and all the others secondarily liable on the depulicate drafts. But the decisions of the Cour de Cassation and the opinions of legal writers cited by the parties and the opinions of the experts examined by them showed that this presumption is rebuttable, and that the person who pays such drafts without notice of opposition may be liable if guilty of negligence sufficient to overcome the presumption.

In the case of Pujol v. Jordaan & Cohen, Dalloz, 1896–2–80, the court, speaking of a forged indorsement whereby the drawee was deceived, said:

"Whereas, the falsification of the check, and the erasure of the words 'Ruffen & Sons' and their substitution by the words 'Elene Paviani' are scarcely apparent; whereas, there exists between the form and the color of the letters composing the words 'Elene Paviani' and the form and color of the other letters of indorsement no such characteristic or striking difference as it would have been inexcusable not to remark; that the imitation is, on the contrary, so perfect that it is very difficult, even after a careful examination, to perceive it; that Pujol was wrong in contending that Jordaan & Cohen failed in the exercise of prudence in not verifying the identity of Elene Paviani," etc.

In the case of Bank of France and Richter-Linder v. De la Roche, Dalloz, 1871–2–27, the court said, among other things:

"Whereas, by the terms of article No. 145 of the Code of Commerce, the drawee who pays a bill of exchange at maturity is presumed to be legally released; whereas, this presumption can only be overcome by proof of collusion, fraud, or gross negligence; but, whereas, in this case, the good faith of the bank is not contested, but it is admitted, on the contrary, that it took the usual precautions in assuring itself as to the residence of the holder of the order, and making him present the stamped envelope in which the order was sent to Paris; that the only fault charged to it was in not having noticed that the signature of the receipt did not conform to the name of Richter-Linder, given in the letter of transmittal; whereas, if the initial letter of the word 'Linder' in the signature placed at the bottom of the receipt resembled rather a 'P' than an 'L,' it is not correct to say that it differed in a noticeable manner from the same letter as written in the indorsement of the order, and of which it rather appeared to be the facsimile," etc.

M. Edmond Kelly, an expert examined by the defendants, testified:

"Q. The article of the Code of Commerce to which you refer, namely, 145, provides merely that there will be a presumption of payment, will it not? A. If it is proved that gross negligence was incurred in the payment of the note, article 145 would not apply."

M. Goirand, writer, says at page 210 of his book, speaking of article 145:

"The drawee must, on presentation of the bill, examine it in order

Digitized by Google

to convince himself that the holder is the rightful owner. He must verify the chain of indorsements and, if it be broken, refuse payment, In other words, he must examine if all the signatures of the indorsers follow each other regularly and correspond, and whether each indorsement is followed by the signature of the indorser whose name is mentioned in the preceding indorsement."

M. Le Sourd, an expert examined by the plaintiff, testified:

"Q. What are the usual precautions which the law imposes upon a banker in making payment of bills of exchange, having reference particularly to the apparent right of ownership in the person presenting the draft for payment and his identity? A. After looking at the draft itself and the date and the amount of the draft, he must look very carefully at the signature and at all the line of indorsements. If there is in the indorsements, or in the signatures, the slightest doubt, he must require from the person who presents the draft all the necessary explanations so as to be as sure as possible that the person to whom he pays has the right to cash the draft. . . . "

He went on to testify that in his opinion the bank had not been guilty of negligence in this case.

The French judgment being not conclusive, but only admissible to show that the drawee did take up the original drafts under the circumstances stated, and that the Tribunal de Commerce of the Seine was of opinion that it was not guilty of such negligence as would overcome the presumption created by article 145, the trial judge was left to determine upon all the facts whether by law of France the drawee was guilty of such negligence. He could consider the decision in the French case as being the opinion of an inferior tribunal, and could give it such weight as he thought it was entitled to under the opinions of the Cour de Cassation which were cited. Doing this, he thought that the failure of the drawee to observe that the chain of indorsements was broken by an indorsement which obviously did not correspond to the name called for in the prior indorsement was such negligence as under the French law would deprive the drawee of the protection of article 145.

We discover no error in this, and the judgment is affirmed.

NOYES, Circuit Judge (dissenting). While unable to reach the same conclusion as the majority of the court, I agree with them in their preliminary propositions, which may be thus summarized: (1) As the drafts were payable in France, the law of that country determined what constituted payment. (2) The burden of showing that the original drafts were duly paid was upon the defendants. (3) The judgment of the French court was a judgment upon the merits of the case, standing upon two grounds. (4) The decision of the Supreme Court in Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, is inapplicable. (5) The French judgment does not constitute res adjudicata. And so in the same way as the majority of the court, I come to the same final question: What was the legal effect under the law of France of what the drawee — the French bank — did?

The majority reach the conclusion that, under the French law, the bank was negligent, and was not discharged by its payment of the first of exchange. On the other hand, I think that the French judg-

Digitized by Google

ment holding the bank discharged should be followed here. The authoritative evidence of the non-statutory law of a country is the decisions of its courts. The construction given by the courts of a country to its statutes will be adopted in other countries. The decisions of foreign lower courts upon the identical facts will be followed here, unless they be shown to contravene the decisions of higher courts. These propositions are conservative. The authority for them may be found in the following illustrative cases: In Elmendorf v. Taylor, 10 Wheat. 159, 6 L. Ed. 289, decided in 1825, Chief Justice Marshall said:

"This court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

In Laing v. Rigney, 160 U. S. 543, 16 Sup. Ct. 368, 40 L. Ed. 525, where the question was as to the effect to be given by a New York court to a decision of a New Jersey court in a matter of New Jersey law, the Supreme Court said:

"In the absence of any statutory direction on the subject, and of any reported decision of the Supreme Court of that State, we are justified in finding the law to be as declared in the very case in hand, where the chancellor of the Chancery Court of New Jersey has entered a final decree based upon an original bill, the process under which was served upon the defendant within the State, and upon a supplemental bill, a copy of which with a rule to plead was served upon the defendant without the State. So long as this decree stands, it must be deemed to express the law of the State."

In Carr v. Francis Times & Co., [1892] A. C. 180, the House of Lords said of a decision of the Sultan of Muscat:

"He has authorized it and declared authoritatively that it was a perfectly lawful act according to the law of Muscat, and I am of the opinion that no English tribunal is capable of going behind that declaration and saying that the Sultan of Muscat was wrong in his exposition of his own law."

In Dent v. Smith, L. R. 4 Q. B. 446, Cockburn, C. J., said of a Russian judgment:

"Then it is said that they applied the law erroneously. Again, I think we have not to deal with that. We are not to sit here as a court of appeal against any judgment pronounced by a court which must be taken to be one of competent jurisdiction in the administration of the Russian law, and, whatever was substituted, became for the time Russian law in respect of matters of maritime law. The proper tribunal to appeal to, if there was any ground for appeal, was to the court of St. Petersburg."

In Doglioni v. Crispin, L. R. 1 H. L. 314, Lord Cranworth distin-

Digitized by Google

guished between a case where the precise point upon the identical facts has been determined by a foreign court and a case where it is necessary to take the testimony of learned foreigners as to the law upon such point:

"It does not always happen, as is the case here, that the claim of the party litigating in our courts has been actually raised and decided in the courts of the country of the domicile. It is, therefore, often matters of necessity that our courts should receive evidence from learned foreigners as to what the law of the domicile is. Such evidence is in general far from satisfactory, but it often happens that no better evidence can be obtained, and then the courts here must ascertain from conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the respondent has been fully adjudicated upon by the courts of his domicile after long and careful consideration, and by their decision we are bound."

And, showing the distinction between the use of a judgment as res adjudicata and as evidence, Lord Cranworth in the same case also said:

"The respondent is not insisting here on the Portuguese decision as a bar to the appellant's demand on the mere ground that it is res adjudicata, but on the ground that it is the decision of a court of exclusive jurisdiction — a decision which we are bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced."

To the same effect are the words of Lord Lindley in Carr v. Francis Times & Co., supra:

"The Court of Appeals, from whose judgment I feel compelled to dissent, appear to have thought that, as at the time of seizure the destination of the cargo seized was Muscat, the seizure was unlawful under the law of Muscat, and that the defendants had failed to prove that the seizure had been subsequently legalized. This view of the finding of the Muscat court, and its approval by the Sultan, ignores its value as evidence of the law of Muscat. I agree with the Court of Appeal that there was no judgment in our sense of the word either inter partes or in rem."

It appears from the French judgment that the question presented to the court there as to whether the drawee was discharged by reason of its payment of the first of exchange was upon the identical facts shown upon the present record. The French court was a court of competent jurisdiction. However constituted, it was created by the French people for the determination of their differences. After a full hearing, the court rendered its judgment upon the merits of the case. It took into consideration article 145 of the French Code of Commerce, which provides as follows:

"The party who pays a bill of exchange at maturity, and not receiving notice of opposition (objection) to the payment, is presumed to be legally discharged."

The court then considered the evidence, and held that the bank had committed no fault in paying the first drafts and was therefore discharged, no opposition to the payment having been made. The parties accepted the decision as correctly stating the French law, for

Digitized by Google

no appeal seems to have been taken. In my opinion this judgment of the French court, upon the identical facts now appearing, is authoritative evidence of the law of France upon the question here arising. The vital point there as here was whether in view of the provision of the Code the bank was negligent and, consequently, not discharged. In such a case the facts are all-important. A different decision upon different facts may not arise from any different construction of the law, but because the facts are different. After a careful examination of the French cases cited by the plaintiff, it does not appear to me that the facts are so similar that in any of them the decision is necessarily contrary to that of the French court upon the present facts. Nor can I accept the opinion of the witness learned in the French law as superior to the judgment of the French court. In the language of Hayes, J., in Dent v. Smith, supra, "One would think that the exposition of a court is about the best evidence you can have of the law of a country." It follows, therefore, that under the French law the payment of the first of exchange was valid, and the defense of payment in the present action established.

It is proper to say, moreover, that I reach the same conclusion if I ignore the French judgment altogether. In other words, I think the facts shown upon this record are insufficient to overcome the presumption under article 145 of the French Code that the bank, by reason of its payment, was discharged.

In the agreed statement of facts this appears:

"The Société Generale made said payments in the ordinary course of business, and over the counter, and without notice that said original bills had been lost, and without opposition or objection to such payments; and there is no evidence that said payments were made in bad faith."

This statement places the bank precisely within the provisions of the Code. It paid a bill of exchange at maturity, without receiving notice of objection to the payment. As we have seen, the Code provides that, under such conditions, a drawee "is presumed to be legally discharged."

The expert witnesses agree that negligence must be clearly shown to overcome the presumption in the bank's favor. The parties agree that the bank's payments were made over the counter in the ordinary course of business, without notice and without bad faith. In my opinion the record fails to affirmatively show negligence. Certainly it fails to show the gross negligence, which one of the experts says must be shown.

It is urged, however, that negligence must necessarily be found from the fact that the forged indorsements omit the letter "s" in the word "Matas." But this would not in itself indicate forgery. A forger would naturally copy the forged name correctly when it was before his eyes, and not make the same mistake twice. While, of course, the indorsements are forgeries, to my mind they bear more the appearance of corrected signatures. But it is said that the irregularity of the indorsements should have put the bank officials upon inquiry. Conceding this, there is nothing upon the record to show that they failed to make inquiries. The agreed statement is silent upon this subject. It cannot be assumed from the mere fact that

Digitized by Google

the record fails to state that the officials did anything that they did nothing. No assumption can be made, one way or the other. The presumption under the Code is in favor of the bank. The fact, standing by itself, that the forged indorsements were irregular, does not in my opinion overcome that presumption. And I cannot read anything more by way either of omission or commission into the agreed statement.

For these reasons, I think that there was error in the judgment of the Circuit Court, and that it should be reversed.

FULLER v. CHENAULT.

(Supreme Court of Alabama. June 16, 1908. Rehearing Denied July 3, 1908.)

47 So. 197.

SALES — RESCISSION — FRAUD — RATIFICATION OF SALE — INJUNCTION — TEMPORARY — CONTINUANCE.

1. The sale of a horse, induced by fraud, may be rescinded by restoring or offering to restore the horse within a reasonable time after discovery of the fraud, unless the horse is valueless, or, failing to do this, there may be an abatement of the price agreed to be paid.

2. The sale of a horse, induced by fraud, may be rescinded, notwithstanding the horse may be worth what was agreed to be paid for him, as the buyer is entitled to such a horse as the seller represented him to be.

3. The sale of a horse, induced by fraud, is not ratified by retention of the horse by the buyer before discovery of his defect.

4. The retention and use of a horse by the buyer, after an offer to restore him to the seller and rescind the sale because of fraud and declination to receive the horse by the seller, does not operate as a ratification of the sale.

5. A buyer, who offered to restore a horse the sale of which was induced by fraud, would have the right to rescind without taking affirmative steps to compel a rescission.

6. Though an answer, full and unequivocal, which positively denies every fact on which the equity for an injunction rests, entitles defendant to a dissolution of a temporary injunction issued, yet the injunction can and should be continued, where it appears that irreparable injury may follow, or that it would be inequitable to dissolve the injunction.

Appeal from Law and Equity Court, Morgan County: Thomas W. Wert, Judge.

Bill by Robert F. Fuller against Frank L. Chenault to enjoin a sale under a mortgage and to cancel the mortgage for fraud. Decree for defendant on the pleadings, and complainant appeals. Reversed, rendered, and remanded.

The allegations of the bill are sufficiently stated in the opinion. The respondent filed an answer denying the fraud and the offer to rescind; also demurrers to the bill, motion to dismiss for want of equity, and the following pleas: "(1) The said Robert Fuller did not act promptly in ascertaining the fraud, if it was practiced upon

Digitized by Google

him, in this: According to the allegations of his bill he kept the horse for three months, from March, 1907, till June, 1907, before he knew of any defects in said horse, and before he knew of said alleged fraud, and he is therefore now not entitled to rescind the contract. (2) Said Robert Fuller kept said horse and used him as his own after he knew of said alleged defect, and on up till the 11th day of October, 1907, and he has thereby ratified his contract of purchase and waived any right he may have had to rescind the sale. (3) Said Robert Fuller has ratified his contract of purchase of said horse, and waived any right he may have had to rescind and disaffirm his said contract, in that he kept possession of said horse and used him as his own for four months after he alleges that he knew that the horse was defective, said use being inconsistent with any rescission of said contract, and he thereby ratified his contract of purchase and waived any right to rescind the same. (4) The said Robert Fuller has ratified his purchase of said horse, and waived any right to rescind the same, in that he kept said horse and used him as his own for several months after he alleges that he became fully aware of the alleged defects in said horse, and he took no steps to compel a rescission until the defendant had placed his mortgage in the hands of his attorney for collection and foreclosure, and after his said attorney had taken steps to foreclose said mortgage." The mortgage was also upon a house and lot which had been advertised under the mortgage for sale at the time of the filing of the bill.

H. V. Cashin, for appellant. G. O. Chenault, for appellee.

ANDERSON, J. The bill in the case at bar was filed to cancel a certain mortgage and enjoin a sale thereunder, because of a fraudulent misrepresentation as to a certain horse purchased by complainant from respondent, and which said horse constituted the sole consideration of the mortgage. The bill contained equity, which said fact was so adjudged by the trial court in overruling the first ground of demurrer to the bill.

If the complainant was induced by fraud to buy the horse, he had the right to rescind the sale by acting seasonably; that is, by restoring or offering to restore the horse within a reasonable time after discovering the fraud, unless the horse was valueless, or, if he failed to do this, to abate the price agreed to be paid. Eagan Co. v. Johnson, 82 Ala. 233, 2 So. 302. The bill avers an offer to restore the horse upon a discovery of the fraud, and, if this be true, the complainant would have the right to rescind, regardless of the actual value of the horse. He was entitled to such a horse as the respondent represented him to be, and was not compelled to keep him, notwithstanding he may have been worth what he agreed to pay for him. The trial court, therefore, erred in sustaining the second and third demurrers to the bill.

The first plea was bad. Retaining the horse before a discovery of the defect could not operate as a ratification of the sale.

The bill avers that the complainant offered to restore the horse to the respondent and to rescind the sale after discovering the fraud, and that the respondent refused to accept said horse and declined to rescind the sale. This reinvested the title in the respondent, and a

Digitized by Google

retention and user of the horse by the complainant did not operate as a ratification of a sale previously rescinded, as he then held the horse as the bailee of the respondent. Hays v. Woodham, 145 Ala. 597, 40 So. 511, explaining Samples v. Guyer, 120 Ala. 611, 24 So. 942. Pleas 2, 3 and 4 should have been held insufficient. It is true the fourth plea alleges a retention and user of the horse after a discovery of the fraud, and that complainant took no step to rescind the sale; but this is not a sufficient denial of complainant's averment that he offered to restore the horse. If he offered to restore the horse, he would have the right to rescind, without taking affirmative steps to rescind the contract.

It is true the answer traverses the allegations of the bill, but admits credits upon the indebtedness. The bill offers to do equity, and as the answer does not show that the house and lot is insufficient to cover the indebtedness due upon the mortgage in case the complainant is not entitled to a rescission, the dissolution of the injunction could be of no detriment to the respondent, and it would operate as a hardship on the complainant to sell his house and lot without permitting him to pay up the balance due on the mortgage in case he was not entitled to a rescission. While an answer that is full and unequivocal, and which positively denies every fact upon which the equity for an injunction rests, entitles the respondent to a dissolution of the temporary injunction issued, yet the injunction can and should be continued in force if it appears that irreparable injury may follow, or that it would be inequitable to dissolve the injunction. Turner v. Stephens, 106 Ala. 547, 17 So. 706; Satterfield v. John, 53 Ala. 127; Chambers v. Ala. Iron Co., 67 Ala. 353.

The decree of the City Court is reversed, and one is here rendered overruling the demurrer to the bill, holding that the pleas are insufficient, continuing the injunction, and remanding the cause.

Reversed, rendered, and remanded.

TYSON, C. J., and DOWDELL and McCLELLAN, JJ., concur.

STANDARD SUPPLY CO. v. CARTER & HARRIS.

(Supreme Court of South Carolina. August 13, 1908.)

62 S. E. 150.

SALES — CONTRACTS — BREACH — DAMAGES — WRONGFUL DEPRIVATION OF USE OF SPECIFIC PROPERTY — MEASURE OF DAMAGES — BREACH OF CONTRACT — DEFAULT OF SELLER — ACTIONS FOR PRICE — COUNTERCLAIM.

1. One who buys an engine to furnish power for a cotton ginnery and explains to the seller the necessity of prompt delivery is, on the failure of the seller to deliver within the time fixed resulting in the ginnery remaining idle for more than forty days of the best part of the season, entitled to recover the value of the use of the plant for such period.

2. Damages for the wrongful deprivation of the use of specific property are measured by the rental value of the property.

3. The damages for the temporary deprivation of specific property due to a

Digitized by Google

breach of contract cannot be restricted to the rental value of the property, where it has no rental value, and in such cases the damages must be ascertained by an inquiry into the value of the use of the property for the time of the deprivation.

4. The measure of damages for the interruption of an established manufacturing plant is the value of the use of the plant to the owner, to be ascertained by inquiry into its past results and the profits earned, while the measure of damages for the prevention of the establishment of a new business does not include profits hoped for; they being too conjectural.

5. The profit which one who installed a ginnery hoped to make in a season is too speculative to constitute a measure of damages for the failure of a seller to deliver machinery within the time contracted for, resulting in the plant remaining idle, and the advantage the ginnery was expected to give the owner in the buying of cotton and cotton seed and collecting accounts is also contingent.

6. In an action for the price of an engine sold to defendant, the answer, alleging that defendant installed a cotton ginnery, that plaintiff contracted to deliver the engine on or before a designated date, to furnish power for the ginnery, that plaintiff, though fully informed of the facts, did not make the delivery until more than forty days later, that defendant was unable to operate the ginnery for more than forty days of the best part of the season, to his injury, etc., states a good counterclaim for damages to be measured by the rental value of the ginnery during the time it was idle by reason of plaintiff's breach of contract.

Appeal from Common Pleas Circuit Court, Lee County; George E. Prince, Judge.

Action by the Standard Supply Company against Carter & Harris. From an order overruling a demurrer to the answer, plaintiff appeals. Affirmed.

Lee & Moise and McLeod & Dennis, for appellant. McLendon & Tatum, for respondent.

WOODS, J. The complaint alleges an indebtedness of the defendant to the plaintiff of $317.20, the price of a lot of roofing and a 12 by 14 Clarke engine. The answer, as a counterclaim, sets up damages to the amount of $1,995 for breach of contract of sale. The appeal is from an order of the circuit judge overruling a demurrer to the answer.

Shortly stated, the substantial allegations of the answer on which the counterclaim rests are: The defendants, merchants doing a large credit business at Elliotts, S. C., installed a cotton ginnery, so that they might not only make a direct profit from ginning cotton, but also facilitate their collections by having the first opportunity to purchase the cotton and cotton seed of their debtors. On April 12, 1906, the plaintiffs for value contracted to deliver to defendants one 12 by 14 Clarke engine on or before August 1, 1906, intended to furnish the power for defendant's ginnery for the season of 1906. The ginning season begins about the middle of August. Though fully informed of the injury that would result to defendant's business from a delay in the delivery of the engine, yet plaintiff did not deliver it until about September 26, 1906. The specifications of damage are thus set out in the answer: "The defendants were unable to operate their said ginnery for more than 40 days of the best part of the cotton ginning season of 1906, during which time a very large per cent. of the cotton

Digitized by Google

crop was ginned; that the money invested in their said cotton ginning plant was idle and unproductive during said time; that by reason of their inability to operate their said cotton ginnery they were caused to lose all of the large patronage, and the profits of the same which was previously theirs, which was assured them, and which they would have gotten, during said time, part of which profits they have never recovered; that a considerable part of said patronage was persons who owed accounts to defendants, and they were deprived of the first opportunity, and in many cases of any opportunity, to buy the cotton of such debtors, which caused considerable injury to their collections; that by being thus thrown out of the first contract with a quantity of cotton and cotton seed which would have come to their ginnery, as the same was prepared for market, they lost the purchase of the same and profits thereof; and that the good will of defendants' cotton ginning business was greatly damaged and injured by reason of said delay — all to the hurt, damage, and injury of the defendants in the sum of $1,995."

The circuit judge was undoubtedly right in holding the allegations of the counterclaim stated a cause of action for the rental value of the ginnery plant, for the period that the plaintiffs' delay in the delivery of the engine kept it idle. It is true, as plaintiff contends, defendants cannot recover remote, contingent, or speculative damages based on profits they hoped to make. Tappan & Noble v. Harwood, 2 Speers, 536; Sitton v. MacDonald, 25 S. C. 68, 60 Am. Rep. 484; Mood v. Tel. Co., 40 S. C. 524, 19 S. E. 67; Colvin v. Oil Mill, 66 S. C. 61, 44 S. E. 380; Hays v. Tel. Co., 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; Howard v. Stillwell Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147. But if the defendant proves his allegations that the operation of the ginnery depended on plaintiffs' delivery of the engine at the time agreed on, that this was fully explained to plaintiff when the contract was made, and that the failure of the plaintiff to comply with its contract prevented the operation of the ginnery, then there cannot be a doubt of the liability of the plaintiff for the direct damages which resulted from the ginnery plant being idle. These damages would be the value of the use of the plant for the period of inactivity due to plaintiffs' delay in delivering the engine. The general rule, well supported by authority and the fairest that could be adopted, is that damages for the wrongful deprivation of the use of specific property are to be measured by its rental value. Tappan v. Harwood, 2 Speers, 536; Martin v. Railway Co., 70 S. C. 8, 48 S. E. 616; Cannon v. Hunt, 113 Ga. 501, 38 S. E. 983; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Brownwell et al. v. Chapman, 84 Iowa, 504, 51 N. W. 249, 35 Am. St. Rep. 326; Boyle v. Reeder, 23 N. C. 607; Williams v. Milling Co., 25 Or. 573, 37 P. 49; Brown v. Foster, 51 Pa. 165; Central Trust Co. of N. Y. v. Arctic Ice Mach. Co., etc., 77 Md. 202, 26 Atl. 493; Wing et al. v. U. S. Fidelity & G. Co. (C. C.), 150 Fed. 672; Hutchinson Mfg. Co. v. Pinch, 91 Mich. 156, 51 N. W. 930, 30 Am. St. Rep. 463; Korf v. Lull, 70 Ill. 420; Livermore F. & M. Co. v. Union C. & S. Co., 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482.

This rule rests on the same reason as the rule that the measure of the vendee's damage for complete breach of the contract for the delivery of goods is the difference between the contract price and the

Digitized by Google

market price. That reason is that things are worth what they will bring in the market, not what the party concerned may think they ought to bring; but, when, in breach of contract for the sale of goods by a final refusal to deliver, there is no market value by which the damages may be definitely ascertained, it would be unjust and absurd to say the recovery must be limited to nominal damages. The damages then, from the necessity of the case, must be ascertained by inquiry into the value of the article to the injured party. A familiar application of this rule is the allowance to a passenger of the value to him of baggage lost by a carrier. Turner v. Railway Co., 75 S. C. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188. Many other conditions to which the rule is applicable appear in the cases cited in note to So. Exp. Co. v. Owens, 9 A. & E. Ann. Cas. 1148, and Todd v. Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 227 In Hydraulic, etc., Co. v. McHaffie, 4 Q. B. D. 670, 13 Eng. Rul. Cas. 558, the plaintiffs were under contract to deliver a certain machine by a certain time, and the defendants contracted with them to make a certain part of the machine called a gun. Owing to the delay of the defendants in making the gun, the plaintiffs were unable to comply with their contract, and the machine was left on their hands. It was held the plaintiffs were entitled to recover from defendants the loss of their profit on the machine and their expenditures uselessly incurred in making other parts of the machine. So, also, damages for the temporary deprivation of specific property of another, due to a breach of contract, cannot be restricted to its rental value, where from any cause it has no rental value. In such cases the damages must necessarily be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Many cases might be cited illustrating this exception to the rule of rental value. A traveling salesman's sample trunks have no rental value, and hence, in Strange v. Railroad Co., 77 S. C. 182, 57 S. E. 724, from necessity, the court laid down the rule that the measure of damages for breach of contract by delay in delivering such trunks, known to be essential to the salesman's business, was his fair average daily earnings. A like measure was adopted in Weston v. Boston & M. R. Co., 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am St. Rep. 330, to the delay in delivery of theatrical properties. Yet it is to be borne in mind the end courts always seek to attain is to give substantial and fair reparation to the injured party, and, at the same time, keep out of the administration of justice speculation and uncertainty. These ends are best attained by adhering to the market sale and rental value as closely as possible, and adopting other measures of damages only when necessity compels because there is no substantial market value.

There is a manifest difference between the interruption of an established manufacturing plant or other business, such as a cotton mill or flour mill, in successful operation, and the prevention of the establishment of a new business. It would, in most cases of the former kind, be exceedingly unjust to limit the award of damages to what the business would rent for, because there would ordinarily be no demand for the temporary use of the business which would express, even approximately, its value to the owner. The measure, then, must be the value of its use to the owner to be ascertained by inquiry into its past

Digitized by Google

results, and the most important factors in ascertaining such past results would be the usual profits earned. 3 Elliott on Evidence, § 1994, and authorities there cited. When a business is in contemplation, but not established, or not in actual operation, profit merely hoped for is too uncertain and conjectural to be considered. 1 Sedg. on Damages, 174, 189; note to Sitton v. MacDonald, 60 Am. Rep. 488; Williams v. Island City, etc., Co., 25 Ore. 573, 37 Pac. 49; Central Trust Co. v. Arctic, etc., Co., 77 Md. 202, 26 Atl. 493; Paola Gas Co. v. Paola Glass Co., 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598; Fraser v. Echo Min. & Smelt. Co., 9 Tex. Civ. App. 210, 28 S. W. 714; Howard v. Stilwell, etc., Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Cleveland, C., C. & St. L. R. Co. v. Wood, 189 Ill. 352, 59 N. E. 619; Vicksburg & M. R. Co. v. Ragsdale, 46 Miss. 458; Rigney v. onette, 47 La. Ann. 211, 17 So. 211.

A cotton ginnery is in operation during the harvest season only, and conditions are so liable to change from one season to another that the profit or loss of one season is only one of several factors in estimating the probable results of the next, and profit which the defendants hoped to make in the season of 1906 is too uncertain and speculative as the measure of damages. The advantage the ginnery was expected to give them in the buying of cotton and cotton seed and collecting accounts was still more contingent and speculative. It is quite possible to arrive at the fair rental value of a cotton ginnery for a cotton season. In making proof of the rental value of a ginnery which had been operated in past seasons, evidence may be offered not only of the physical condition of the property, but of all the conditions which surround it, including its patronage, and success and hazards in the past, and any change for better or worse in such conditions. All of these, and perhaps other matters, would be inquired into by those contemplating the renting of the property, and they are therefore factors entering into the determination of the market rental value; but neither the past success indicated by the profits, nor any other single factor, is to be taken as controlling. Evidence of all these factors, along with other competent evidence, is admitted in order to arrive at the fair rental value. Lipscomb v. Railroad Co., 65 S. C. 148, 43 S. E. 388; Novelty Iron Wks. v. Oat-meal Co., 88 Iowa, 524, 55 N. W. 518; Leick v. Tritz, 94 Iowa, 322, 62 N. W. 855; Logemann v. Pauly, 100 Wis. 671, 76 N. W. 604; Nelson v. Minn. & St. L. Ry. Co., 41 Minn. 131, 42 N. W. 788; Mace v. Ramsey, 74 N. C. 11; Lavens v. Lieb, 12 App. Div. 487, 42 N. Y. Supp. 901; Williams v. Island City Milling Co., 25 Ore. 573, 37 Pac. 49.

The answer states a good counterclaim for damages to be measured by the rental value of the ginnery from August 15 to September 26, 1906, the period alleged to have been lost by the plaintiff's breach of contract.

The judgment of this court is that the judgment of the Circuit Court overruling the demurrer be affirmed.

Digitized by Google

IOWA MFG. CO. v. B. F. STURTEVANT CO.

(Circuit Court of Appeals, Eighth Circuit. May 25, 1908.)

162 Fed. 460.

SALES — REMEDIES OF BUYER — DAMAGES — MEASURE — DELAY IN PERFORMANCE OF CONTRACT — CONTRACTS — PROOF OF DAMAGES — DEFENSES — ASSESSMENT — SPECIAL DAMAGES — QUESTION FOR JURY.

1. Special damages may be recovered for breach of a contract for a sale of machinery by a failure to deliver it within the time required by the contract where they are the natural and direct result of the breach, owing to special circumstances known to the parties when the contract was made, although such circumstances may not have been stated in the formal contract, and where the amount can be ascertained with reasonable certainty.

2. Where defendant which had contracted with a State to equip a public building with heating and lighting plants failed to complete the work within the time required by the contract, in consequence of which the State deducted from the price the amount of liquidated damages for the delay, provided by the contract, and defendant made settlement on that basis, and there was testimony that the delay was caused solely by the failure of plaintiff to deliver certain machinery required for the work within the time agreed upon and that it had knowledge of the terms of defendant's contract, it was no defense to a claim by defendant for special damages for breach of contract that, in case it failed to recover the same, it contemplated presenting a claim to the legislature of the State for payment of the amount withheld; there being no pretense that the state was under any legal liability therefor.

3. An issue as to the right to recover special damages for breach of a contract held, under the evidence, one for the jury.

In error to the Circuit Court of the United States for the Southern District of Iowa.

Frank S. Dunshee (Clinton R. Dorn and Irving C. Johnson, on the brief), for plaintiff in error.

James P. Hewitt, Ambrose Risdon, A. C. Parker, and Craig T. Wright, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

ADAMS, Circuit Judge. The Sturtevant Company sued the Iowa Company for a balance due on a contract for the sale and delivery of machinery. Defendant admitted the sale and delivery, pleaded a payment of $4,020 on account, and set up a counterclaim for damages occasioned by plaintiff's failure to deliver the machinery according to contract. The trial resulted in a verdict for plaintiff for the balance due on the contract, a verdict for the defendant on its counterclaim for an item of $871.90 for loss of laborers' time occasioned by plaintiff's delay, and a denial by direction of the court of defendant's further claim for an item of $1,475. Defendant prosecutes error solely on account of that denial.

Was there any substantial evidence entitling the defendant to go to the jury on that item? The facts are these: The defendant, the Iowa

Digitized by Google

Company, on May 27, 1905, made a contract in writing with the State of Misourt to equip the State Normal School at Cape Girardeau with machinery and appliances for lighting, heating, and ventilating the building. The contract obligated defendant to complete and fully install the work on or before October 15, 1905, and contained a stipulation requiring the payment of $25 per day to the State for each and every day's delay in performance after the date so fixed. The learned trial judge ruled in view of the circumstances attending the case that this stipulation was enforceable as between the parties to that contract as a reasonable and proper provision for liquidated damages as distinguished from a penalty, and no contention is now made to the contrary. Defendant not being a manufacturer of the required machinery and appliances, on June 6, 1905, entered into a written contract with plaintiff, the Sturtevant Company, whereby the latter obligated itself to furnish and deliver the same f. o. b. cars at Cape Girardeau within one month thereafter, that is, on or before July 6, 1905. Plaintiff failed to perform its part of the contract within the stipulated time. It shipped nothing until October, and then only a part of the machinery. The balance followed, some in November and some as late as January, 1906. On the completion of the work defendant was required to allow $25 per day, the stipulated liquidated damages for 59 days' delay, or a total sum of $1,475, which was in settlement deducted from the amount otherwise due the defendant from the State of Missouri, according to the terms of the contract. The trial judge sustained objections to some of the evidence offered in support of defendant's right to recover this item from plaintiff, and all of it was ultimately by direction of the court withdrawn from the consideration of the jury.

The court assigned as grounds for its action (1) that it was not provided in the contract between plaintiff and defendant that there should be any damages in case of failure to furnish the machinery within the stipulated time; and (2) that it did not appear that defendant had been charged with this item in settling with the State of Missourt or that it had sustained any loss by reason of the delay. The first ground is clearly untenable. The rule governing the recovery of special damages for the breach of a contract has been frequently stated by this court, and most recently in the case of Taber Lumber Co. v. O'Neal (C. C. A.) 160 Fed. 596, where it is said:

"Such damages, as distinguished from those ordinarily sustained, can be recovered only when they are the result of special circumstances known to the parties at the time the contract was made, when they are the natural and direct result of a breach and when they can be ascertained with reasonable accuracy."

To the same effect are the cases of McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110, and the many other cases cited. There was, in our opinion, ample evidence tending to bring the defendant's claim within the protection of this rule.

Defendant's secretary and general manager testified that at the time of executing the contract between plaintiff and defendant he informed the plaintiff that his company was under contract obligation to finish the entire work of installing the machinery in the Normal

Digitized by Google

School on or before October 15, 1905, and also that it was liable to pay $25 per day for each day's delay thereafter. This evidence taken in connection with the stipulation in the contract requiring plaintiff to ship all the machinery before July 6th tends to show knowledge by plaintiff of such special circumstances as might occasion unusual damages to defendant if the former failed to deliver the machinery in due time, and also tends to show that such damages would be the direct and natural consequences of such failure. It is of no consequence, in our opinion, that a statement of the circumstances was not contained in the formal contract itself. Knowledge of them brought to plaintiff in any manner at the time of entering into the contract served the required purpose of warning it of the special peril which might attend the failure to keep its engagements and subjects it to the special damages likely to follow and reasonably to be apprehended from such failure. Plaintiff made the contract in contemplation of the special circumstances so known to it, and, in case of breach, is liable for the natural and proximate result thereof.

Does it so clearly appear that defendant sustained no loss by plaintiff's delay as to justify the court's action in withdrawing the claim therefor from the consideration of the jury? The evidence is uncontradicted that the defendant did not complete its work until 77 days after the limit of time prescribed in its contract with the State. The State conceded that it was itself responsible for the delay to the extent of 18 days and charged to defendant the agreed sum per day for the balance, 59 days, amounting in the aggregate to $1,475. Prima facie the failure to perform within the time limited created a liability against the defendant in favor of the State for the agreed amount of the liquidated damages; but this, of course, would not create any liability against plaintiff unless it had, with the knowledge of the special circumstances, in some way occasioned the delay. If plaintiff did so occasion the delay, it ought to be and is responsible for its consequences. The evidence is within a narrow compass. Defendant's secretary and general manager testified that the delay in getting the machinery and appliances from plaintiff within the time fixed by the contract alone caused the delay in the execution of its contract with the State. He also testified, in substance, that his company could not finish its work until the Sturtevant engines and other machinery arrived. Suffice it to say that there was evidence amply sufficient to go to the jury tending to show that the failure of the Sturtevant Company to make delivery of its machinery within the agreed time occasioned some if not all of the delay in the performance by defendant of its contract with the State.

The learned trial judge said that it does not appear that defendant has been charged with the item in question by the State, but that it does appear that plaintiff has a pending claim against the State for the item in question as the balance due on the contract price. We think this statement discloses a misapprehension of the facts of the case. The only evidence on this subject is that given by the secretary and manager. He testified that his company had a settlement with the State authorities of Missouri; that the State deducted from the contract price $1.475 in money because of his company's delay in performance; that his company settled the matter with the State on

Digitized by Google

that basis, that is, on the basis of admitting that there were $1,475 due to the State as liquidated damages for failure to perform the work in time. The only indication to the contrary is a letter written by Lewis Houck, the chairman of the board of regents of the Normal School to defendant's secretary and manager under date April 19, 1907, a year and a half after the time of performance of the contract had expired. As this letter seems to be the basis of the court's rulings we reproduce it so far as relevant. It is as follows:

"In regard to the $1,475 which we deducted from your contract price as a penalty, we have done nothing, expecting that you would appear before the Legislature and make your claim. . . . The board at no time made any promise that it would undertake to prosecute your claim before the Legislature, but did tell you, and I individually promised that I would recommend the matter to the committee on appropriations as strongly as I could and was ready to do so, but when you failed to apply or appear or have a representative at Jefferson City to urge the matter I supposed you had concluded to let the matter go. . . . I do not think there would have been the least trouble for you to have secured an appropriation for this amount from the Legislature, and of course, it will not be too late even at the next session to urge your equitable claim, but you will have to look after it personally and must not expect us to act as your agents in such a matter as that."

Conceding, but not deciding, that the Houck letter became competent evidence in connection with the examination and cross-examination of plaintiff's witness, its purport does not seem to us of any importance. The legitimate inference to be drawn from it is that defendant had at some time indicated a purpose to secure a remission of the State's claim for liquidated damages by legislative enactment. We fail to discover in such intention, if it existed, anything inconsistent with the existence of a valid claim against the plaintiff on the claim. It is frequently true that a claimant has more than one legal or equitable remedy; to say nothing of the moral obligation which oftentimes impels right thinking persons to action. Defendant's secretary and manager frankly admitted that, if he did not succeed in getting satisfaction from the plaintiff, it was his intention to try to secure a favorable action by the Legislature. It is not pretended that the State was under any legal obligation to make the loss good to defendant. The claim against the State is one, if any, of imperfect obligation only and cannot in itself affect the legal liability of plaintiff to defendant one way or the other. A different result would, of course, follow if the State had acted upon the claim and remitted the damages. Then there would have been no loss sustained by the defendant by reason of the delay. Counsel for plaintiff argued orally that as the State occasioned 18 days of the delay in question, and, as plaintiff was not a party to the adjustment between defendant and the State, it was exonerated from any liability for the liquidated damages. Inasmuch as this question was not raised in the court below nor presented in the brief of counsel so as to afford defendant an opportunity to meet the contention, we refrain on this writ of error from expressing any opinion on the legal effect of such facts.

Our conclusion is that the court erred in excluding and withdraw-

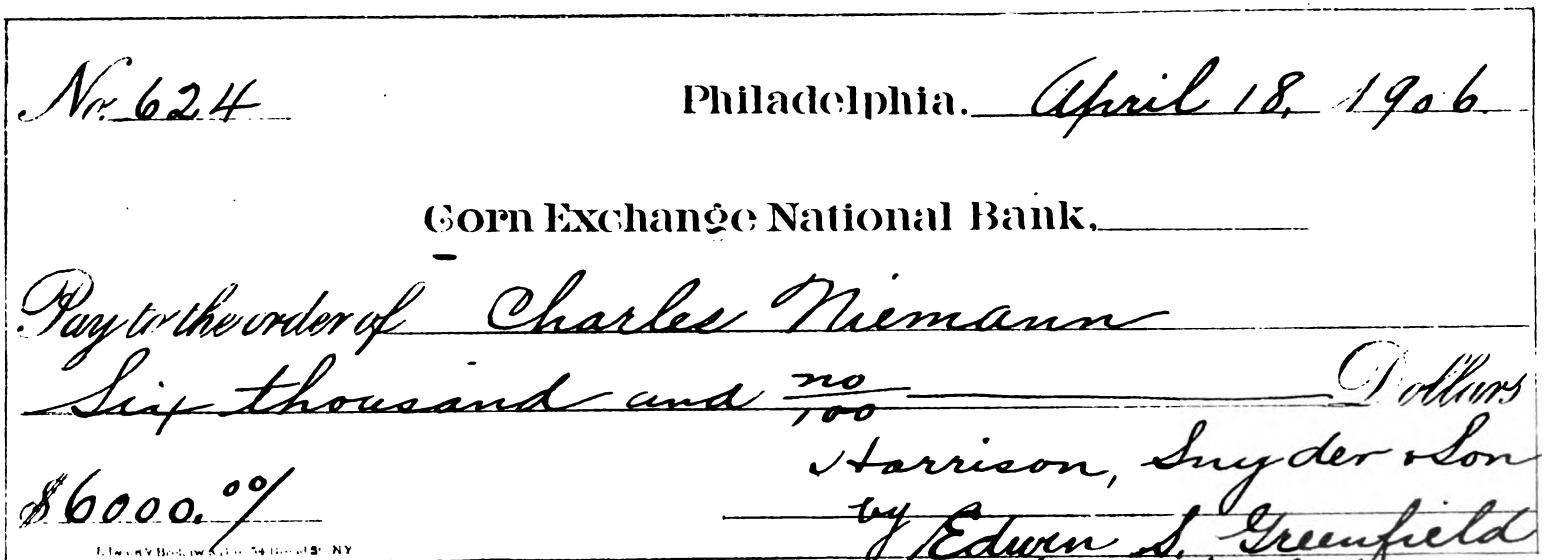
Digitized by Google

ing the evidence in question from the consideration of the jury. Whether or not the obligation of defendant to perform its work within the time specified and subject to the terms specified in its contract with the State in the way and with the results already pointed out and considered was known by plaintiff when the contract between it and defendant was executed, and whether or not plaintiff's delay occasioned any part of defendant's delay and consequent loss and damage, and, if so, how much, are, as the case now appears, questions for the jury. Notwithstanding the fact that defendant admitted that it was liable to the State for the amount in question that admission does not conclude plaintiff as to the liability. That issue with the others must be tried de novo between the parties to this suit.

The judgment is reversed and the cause remanded for a new trial.

Digitized by Google

Bills and Notes: Checks Payable to Fictitious or Non-existing Payee: Payable to Bearer.



No. 624 Philadelphia. April 18, 1906

Corn Exchange National Bank,

Pay to the order of Charles Niemann

Six thousand and no/100 Dollars

$6000.00/100

Harrison, Snyder & Son

by Edwin S. Greenfield

attorney-in-fact

Digitized by Google

Pay to the order of
R M Miner and Co
Chas. Niemann
R. M. Miner and Co

PAY FIRST NATIONAL BANK OF
PHILADELPHIA, PA.
indorsements guaranteed.
REAL ESTATE TITLE INSURANCE &
TRUST COMPANY OF PHILADELPHIA
by
James C. Beach,
Secretary.

The above indorsement of Charles Niemann to the order of R. M. Miner & Company was not made by Charles Niemann, but by the drawer of this check, Edwin S. Greenfield. Edwin S. Greenfield was an employee of the plaintiff in this action, George Snyder, who did business as Harrison, Snyder & Son. Snyder had executed a power of attorney authorizing the said Greenfield to sign his name to checks, and the Corn Exchange Bank, upon which this check was drawn and in which the plaintiff had a deposit account, had honored many checks drawn by Greenfield under his power of attorney from Snyder. Greenfield was not authorized to draw this check to the order of Charles Niemann, and when he drew the check he had no intention of delivering the same to Niemann. Greenfield indorsed the name of Niemann on the back of the check and delivered the same to R. M. Miner & Company for his own personal benefit. The check was deposited by R. M. Miner & Company in the Real Estate Title Insurance and Trust Company of Philadelphia, and the money was paid to the said company by the Corn Exchange National Bank. The Corn Exchange National Bank charged the amount of the check to the account of Snyder, and he repudiated his liability on the check on the ground that the subsequent holders of the check had no valid title to the check for the reason that they acquired no title through the forgery, and as the Real Estate Title Insurance and Trust Company had not a valid title to the check, the money could be recovered from them by the Corn Exchange National Bank for this reason and the further reason that the Real Estate Title Insurance and Trust Company had guaranteed the indorsements. The court held, however, that as the drawer of the check had no intention of delivering the same to the payee named, the check was payable to a fictitious person, therefore payable to bearer. The Negotiable Instruments Law provides that a check is payable to bearer which is payable to a fictitious or non-existing person, and this fact is known to the drawer. As this check is payable to a person whom the drawer never intended to receive it, the check is payable to bearer, and being payable to bearer, the subsequent indorsees acquired good title, and the Corn Exchange Bank could not have recovered the money from the Real Estate Title Insurance and Trust Company.

The check was properly charged to the account of George Snyder. There could be no question but that his account would have been properly charged had he actually drawn the check himself to the order of Charles Niemann and indorsed the name of Charles Niemann on the back. The court held that the situation was not changed by the fact that an employee of Snyder drew the check under a power of attorney, which authorized him to draw checks for Snyder. The judgment in favor of the Corn Exchange Bank was affirmed.

Digitized by Google

Bills and Notes: Negotiable Instruments Law: Fictitious Payee: Forged Indorsement.

The plaintiff in this action is George Snyder, who did business and traded as Harrison, Snyder & Son. He had in his employ a man by the name of Edwin S. Greenfield, to whom he had executed a power of attorney, authorizing the said Greenfield to sign his name and the name under which he did business to checks. Greenfield drew a check similar to the illustrated one upon the Corn Exchange National Bank, payable to the order of Charles Niemann. He indorsed the name of Charles Niemann on the back of the check, and delivered it to the firm of R. M. Miner & Company, who conducted a "bucket shop" stock brokerage business in the city of Philadelphia. Miner & Company indorsed the check and deposited it with the Real Estate Title Insurance and Trust Company, to whom the money was eventually paid by the Corn Exchange National Bank. This action was brought by Snyder against the Corn Exchange National Bank, with whom he had his deposit account, because the Corn Exchange National Bank had charged this check to his account. The Supreme Court of Pennsylvania held that Snyder could not recover. Snyder based his right to recover upon the allegation that, as the name of the payee had been forged by his employee, Greenfield, and no title passes through a forgery, the Real Estate Title Insurance and Trust Company did not acquire a valid title to the check, and the Corn Exchange Bank for that reason could recover

Digitized by Google

from the Real Estate Title Insurance and Trust Company, to whom the money was paid. Furthermore, the Real Estate Title Insurance and Trust Company guaranteed prior indorsements, and this was a further reason which would aid the Corn Exchange Bank in reimbursing itself by payment from the Real Estate Title Insurance and Trust Company. The Supreme Court held in this case that, when Greenfield drew the check, he had no intention of giving it to the person named as payee, although the person named as payee was a real entity. The Negotiable Instruments Law provides that a check is payable to bearer, where it is payable to a fictitious or non-existing person and this fact is known to the drawer, consequently this check was payable to bearer. Being payable to bearer, the Real Estate Title Insurance and Trust Company acquired a good title to the check and the Corn Exchange Bank could not recover from the Real Estate Title Insurance and Trust Company on its indorsement, and properly charged this check to Snyder's account. The court furthermore held that Snyder had put it in the power of Greenfield to perpetrate this fraud. Other checks drawn under this power of attorney had been honored by the bank and no objection was ever made by Snyder, although thousands of dollars of such checks had been paid out under this power of attorney. If Snyder himself had drawn the check payable to Charles Niemann and indorsed the name of Charles Niemann on the back of the check, there would be no question but that, if the Corn Exchange Bank paid such a check, Snyder could not recover from the bank. How is the situation changed when Greenfield signed the check acting under power of attorney from Snyder? If the check had been intended for Charles Niemann and Charles Niemann's name had been forged, there is no question but that Snyder could have recovered from the Corn Exchange Bank, because no title passes through a forgery. The fact that, although Niemann was an existing person, the drawer of the check did not intend that he should ever receive the check, the drawer thereby made the check payable to a fictitious payee, and under the Negotiable Instruments Law it was therefore payable to bearer. Being payable to bearer, the subsequent holders of the check acquired good title.

The court said in part:

"By our Negotiable Instruments Act of May 16, 1901 (P. L. 194) a check is payable to bearer 'when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.' The averment in the affidavit of defense is that Niemann was not a real, bona fide payee, but was in legal contemplation a fictitious person, such fact having been well known to Greenfield at the time he drew the checks; that Niemann had no right to them, or any of them, and it never was intended by Greenfield that he should receive them or their proceeds. Niemann may have been an existing person, but he could have been, and was,

Digitized by Google

a fictitious one within the meaning of the act of assembly if Greenfield intended to use his name, and did use it, as that of a person who should never receive the checks nor have any right to them. The intent of the drawer of the check in inserting the name of a payee is the sole test of whether payee is a fictitious person, and the intent of the drawer of these checks as attorney for appellant must, as just stated, be regarded as against the bank upon which they were drawn as the intent of the appellant himself. A fictitious person within the contemplation of the Act of 1901 is not merely a non-existing one; for, if so, the word 'non-existing' would have been sufficient without more. It is clear, then, that, when the legislature declared that a check payable to a 'fictitious or non-existing person' is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed. In Bank of England v. Vagliano, L. R. Appeal Cases (1891) 107, the English Bills of Exchange Act of 1882, after which our Act of 1901 was modeled, was construed, and, in answering the contention that the word 'fictitious' was only applicable to a creature of imagination, having no legal existence, Lord Herschell said: 'If so, there was no necessity for the introduction of the word "fictitious" in the enactment. The word "non-existent" would have sufficed. . . . Where, then, the payee named is so named by way of pretense, only without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word "fictitious" is exclusively used to qualify that which has no real existence.' Lord Morris, following, said: 'I entirely agree in the conclusion arrived at by my noble and learned friend, Lord Herschell, viz., that, whenever the name inserted as that of the payee is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, § 7, subsec. 3, and that the bill may be treated by a legal holder as payable to bearer; and, having had the advantage of reading the noble and learned lord's judgment in print, I concur in the reasoning by which that conclusion is arrived at.' In this Lord Watson concurred, saying: 'I think that the language of the subsection, taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either non-existing, or, being in existence, has not, and never was intended to have, any right to its contents.' In Phillips v. Mercantile National Bank of New York, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, a case singularly similar to the one now before us, the New York Court of Appeals, in construing the word 'fictitious' in a statute of that State containing the same provision as ours, attached to it the same meaning as is given to it in Vagliano v. Bank of England. Bartlett, the cashier of the National Bank of Sumter, S. C., had authority from it to draw checks or drafts upon the Mercantile National Bank of New York, with which it had an account. He drew checks upon that bank, making them payable to the order of existing persons, but without their knowledge, and then indorsed

Digitized by Google

the checks in their names to a firm of stock brokers in New York, who collected them from the Mercantile National Bank. The receiver of the Sumter bank brought suit against that bank to recover back the amounts which it has paid on Bartlett's checks, on the ground that the indorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were those of known and existing ones, and were, therefore, to be garded as having been made payable to bearer and intended for delivery to the stock brokers in New York. This having been the intent of Bartlett, who had authority from his bank to draw the checks, his intent was said to have been, so far as the New York bank was concerned, the intent of his bank, and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the court said: 'Whether indorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant.' Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310. In the case cited a bill was drawn upon the plaintiff to the order of one Truman Billings, and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings, a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. Bronson, J., said: 'As the payee had no interest, and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill, which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer.' The case of Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, . . . was a case wholly other than was made out here. It was stated in the Shipman Case that the maker's intention is the controlling consideration which determines the character of the paper, and that the statutory rule which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principal of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that by the methods resorted to he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. . . .

Digitized by Google

The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others, who themselves, acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers. It may be quite true that the cashier was not the agent of the bank to commit a forgery or any other fraud of such a nature, but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them, made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity.' If the checks drawn by Greenfield to the order of Niemann as a fictitious person had been drawn by Snyder himself with the same intent as Greenfield's, and he had indorsed Niemann's name on them and handed them to R. M. Miner & Company, it would not be pretended that he would have any claim against the appellee. And yet this is the real situation; for, when Snyder lodged with the bank his power of attorney to Greenfield, he in effect said to it: 'Any check drawn upon you by Greenfield as my attorney and issued by him is to be paid by you as having been drawn and issued by me.' If this is not sufficient to protect the bank from liability for what the appellant now charges were its mispayments out of his funds, it is not easy to conceive what would be. The guarantee of the previous indorsements on the checks by the Real Estate Title Insurance and Trust Company was a guaranty of the indorsement of R. M. Miner & Company, for it was the only one upon the checks in legal contemplation when they were deposited with the trust company. When the checks were delivered to R. M. Miner & Company they were, as shown, payable to bearer, and nothing, therefore, need be said on the contention of the appellant as to the liability of the trust company to the appellee upon the guaranty of the indorsement on the check, unless it be to repeat what we have said through our Brother Fell in recognizing the liability of a bank to its depositor for payment of a check on a forged indorsement: 'The rule applies where a check has been lost or stolen and the payee's name has afterwards been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one who he has reason to suppose will make a

Digitized by Google

fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank.' Land Title & Trust Company v. Northwestern National Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717. The allegation that the checks were delivered to R. M. Miner & Company in connection with gambling or wagering transactions is unavailing in view of the averments in the affidavits of defense. Bank v. Arnold, 187 Pa. 356, 40 Atl. 794."

See Decision No. 1117.

Bills and Notes: Presentment for Payment: Presentment by Telephone.

The plaintiff in this action is Richard S. Gilpin, the indorsee of William M. Savage, who had indorsed a promissory note executed by his son, Walter Savage. The note was payable at the residence of the maker in the city of Buffalo. It was forwarded for collection to a bank in Buffalo by the holder upon the note's maturity. The clerk in the bank called up the maker on the telephone and described it, and asked the maker what he was going to about it. The maker replied in substance that he could not pay it; that there had been an agreement to renew the note, and it would be taken care of at the other end. The clerk in the bank called the cashier of the bank to the telephone, and the maker repeated the statement which he had made to the clerk. The cashier told the maker that the bank did not know of any such arrangement, and that the bank would be obliged to protest the note. The note was duly protested. The defense of the indorser on the note is that this demand for payment over the telephone was not a sufficient presentment to charge the indorser. The court, in an interesting opinion, decides that a presentment made over the telephone is a sufficient presentment. Of course, it must be borne in mind in this case that the note is payable at the residence of the maker, where it should be presented for payment. The maker has a right to demand an exhibition of the paper, but he may also waive this right, and in this case it was held that he did, because he treated the telephone conversation as a demand for payment and declined to pay.

The court said in part:

"As suggested, two lines of inquiry present themselves: First, was there a presentation at No. 507 Prospect avenue; and, if not, was its presentation excused, so as to still charge the indorser? Section 132 of the Negotiable Instruments Law (Laws 1897, p. 736, c. 612) provides that:

"' Presentment for payment, to be sufficient, must be made: . . . (3) At a proper place as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.'

Digitized by Google

"Section 133 provides that:

"'Presentment for payment is made at the proper place: (1) Where a place of payment is specified in the instrument and it is there presented.'

"Section 134 provides:

"'The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.'

"Section 142 provides that:

"'Presentment for payment is dispensed with: . . . By waiver of presentment, express or implied.'

"Section 144 provides that:

"'Subject to the provisions of this act, when the instrument is dishonored by non-payment, and immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.'

"It was the evident purpose and intent of the framers of the statute to incorporate into the statute the provisions of the common law, although there follows the usual embarrassment which all codifiers encounter in framing a statute to meet all possible cases. Was the note in this case presented at No. 507 Prospect avenue, the place of payment named in the note, within the reasonable meaning of the statute? We think it was. At the time of the conversation between the maker and the bank officials over the telephone, the maker was actually at the place of payment. The talk was immediately between him and the holder of the note. For every purpose of demand and refusal it was just as effective as though the conversation had taken place between the parties when all were within the walls of the house itself. The maker knew perfectly well that a demand was then and there made upon him for the payment of the note in question, and he was then and there called upon to act. He did act, and treated it as a demand for payment, and declined to pay. He did not question the mode or manner of presentment, but declared his inability to meet the note, and made claim to some arrangement for its renewal. Of course, the maker had the right to have insisted on the exhibition of the note to him as evidence of the bank's authority to collect. That right was a right, however, personal to the maker, and by not demanding its production he waived it. If, on demand of payment, exhibition of commercial paper is not asked, and a party to whom demand is made declines to pay on other grounds, a mere formal presentation by actual exhibition of the paper will be considered waived. Daniel on Negotiable Instruments, § 654; Lockwood v. Crawford, 18 Conn. 361; King v. Crowell, 61 Me. 244, 14 Am. Rep. 560; Porter v. Thorn, 40 App. Div. 34, 57 N. Y. Supp. 479, affirmed 167 N. Y. 584, 60 N. E. 1119. It seems to the court that all the essentials of a good presentation were met. It was made on the day of the maturity of the note. The note was described to the maker, in a conversation with the maker at the place of payment. Payment was asked and declined. So far as the maker was concerned, all that he required was done. The indorser could not well demand more for his own actual protection. All that remains to the indorser is the purely technical ground of a failure to produce the note itself at the house, 507 Prospect avenue, which would have resulted in the same refusal of payment made over the telephone. The use of the modern

Digitized by Google

invention of the telephone is recognized by the courts. Commercial transactions and conversations had over the telephone have been recognized as of the same binding force as where the parties talked face to face. Globe Printing Co. v. Stahl, 23 Mo. App. 451, 458; Wolfe v. Mo. Pacific R. R. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; Rock Island & P. R. Co. v. Potter, 36 Ill. App. 590; Guest v. Hannibal & St. J. R. R. Co., 77 Mo. App. 258; Thompson & W. Co. v. Appleby, 5 Kan. App. 680, 48 Pac. 933; Murphy v. Jack, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590; Deering & Co. v. Shumpik, 67 Minn. 348, 69 N. W. 1088. The telephone is simply an instrument by which two persons may talk directly to each other. Suppose the holder of a note should call to the maker from across a street, as the maker stood in his doorway, and notify him that he had his note and ask payment. Would not such a demand be deemed in law a proper presentment, although the street separated the person holding the note and the actual place of payment? Can it make any substantial difference because the person holding the note happens to be some blocks away, provided he is able to reach the maker over the telephone and talk directly to him in that way? The law simply requires substantial compliance in reference to proper presentment, and will not strain to find grounds for releasing an indorser, where there has been such a substantial compliance, and any omission to observe the more technical rules does not work to the prejudice of the indorser. Actual and formal presentation of notes has been held unnecessary to charge the indorser under many varying circumstances, as where the maker dies before the maturity of the note and no representative of his estate has been appointed (Daniel on Commercial Instruments, § 1111), or where the maker has absconded (Id., § 1125), or where the maker has removed from the State and taken up his domicile in another State or country. Id., § 1145; Foster v. Julien, 24 N. Y. 28, 80 Am. Dec. 320; Eaton v. McMahon, 42 Wis. 487; Whitley v. Allen, 56 Iowa, 224, 9 N. W. 190, 41 Am. Rep. 99; McGruder v. Bank of Washington, 9 Wheat. 598, 6 L. Ed. 170. It has been held a sufficient demand and refusal to constitute a dishonor of a note if the maker, on the day it is due, calls on the holder where the note is and declares his inability to pay, and desires the holder to give notice to the indorser. Gilbert v. Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329. So, too, in an action against an indorser, it appeared the holder met the maker of a note on the street and was refused payment, making no objection to the place of demand, and the court said: 'If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand.' King v. Crowell, 61 Me. 244, 14 Am. Rep. 560.

"In the case of Tredick v. Wendell, 1 N. H. 80, the note was at the bank. The maker lived within a few rods of the bank, and a letter was sent him, stating the note was at the bank and requesting payment. Held a sufficient demand to charge the indorser. The weight of authority, therefore, seems to be that the law is not overexacting as to the mode or method of presentation, so long as an opportunity is given the maker to pay the note or refuse its payment. For these reasons we think the presentation made in this case, although over the telephone, met the substantial requirements of the law."

See Decision No. 1118.

Digitized by Google

$1327.41

COAL OFFICE OF HADDOCK, BLANCHARD, & CO., INCORPORATED.

New York, April 28, 1902.

Four months after date pay to the order of ourselves

Thirteen hundred twenty-seven and 41/100 ----------Dollars

Value received and charge the same to the account of

To Montauk Coal Co.

Brooklyn, N.Y.

Pay to the Binghamton Trust Co. Binghamton, N.Y. or order
The Binghamton Trust Co.
Pay to the order of The Montauk Coal Co.
Chas. E. Smith, Treas.

Haddock, Blanchard & Co. Incorporated
C. N. Blanchard, Asst. Treas.

Digitized by Google

Haddock, Blanchard & Co.
Incorporated.

C. N. Blanchard,
Assistant Treasurer

John C. Haddock

John C. Haddock, the above indorser, was the president of Haddock, Blanchard & Company at the time this draft was drawn. The draft was drawn upon the Montauk Coal Company, which had purchased coal of Haddock, Blanchard & Company. John C. Haddock owned practically all the stock of the Montauk Coal Company at this time, and the evidence adduced at the trial showed that he had agreed to guarantee the credit of the Montauk Coal Company, if Haddock, Blanchard & Company would sell coal to it. This was one of the drafts, drawn upon the Montauk Coal Company, which the Montauk Coal Company accepted and which John C. Haddock indorsed. The draft is drawn by Haddock, Blanchard & Company payable to themselves and indorsed by them. It was discounted at the Binghamton Trust Company, and it was presented for payment upon its maturity, and not being paid, it was duly protested. Haddock, Blanchard & Company sought to recover from John C. Haddock upon his indorsement. He contended that he did not indorse the draft for the accommodation of the maker, but the weight of evidence showed that he did. Of course, the Negotiable Instruments Law provides that an irregular indorser is liable to all parties subsequent to the maker or drawer, if the instrument is payable to the order of the maker or drawer, or is payable to bearer; and the Negotiable Instruments Law further provides that indorsers are liable prima facie in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise. The court in this action held that the drawee by accepting the draft became the party primarily liable, and the draft after its acceptance was virtually a promissory note payable to the order of the payee and made by the acceptor. Of course, on the back of this instrument there are the two indorsers, Haddock, Blanchard & Company and John C. Haddock, and the Negotiable Instruments Law provides that among themselves evidence may be introduced to show what their respective liability is. The evidence in this case showed that John C. Haddock was liable on this note to Haddock, Blanchard & Company; that he had indorsed it for the accommodation of the drawee and acceptor, and that credit was extended to the drawee by the drawer on the strength of his indorsement.

Digitized by Google

Bills and Notes: Drafts: Irregular Indorser: Parol Evidence to Determine the Liability of Parties.

The plaintiff in this action, Haddock, Blanchard & Company, drew a draft, of which the illustration is a copy, to the order of themselves upon the Montauk Coal Company, to whom they had sold some coal. The draft was indorsed by John C. Haddock, below the indorsement of Haddock, Blanchard & Company. The draft was accepted by the Montauk Coal Company, but was not paid. This suit was brought by the drawers of the draft against the indorser, charging him with liability on the theory that he was an accommodation indorser for the benefit of the makers of the draft. To understand this situation thoroughly, the following facts must be considered: Haddock, Blanchard & Company was a corporation engaged in the wholesale coal business. The defendant, John C. Haddock, practically owned the Lenape Coal Company, the Living Stone Coal Company and the Montauk Coal Company, which were companies engaged in the retailing of coal in and near New York city. These last three mentioned corporations desired to buy coal of Haddock, Blanchard & Company and their credit was investigated by the vice-president of Haddock, Blanchard & Company and found to be unsatisfactory. John C. Haddock, who was the president of Haddock, Blanchard & Company at the time, said that these companies were his and if Haddock, Blanchard & Company would sell the coal to these companies he would guarantee their credit by indorsement. This draft, which is the subject-matter of this action, was one of the drafts drawn by Haddock, Blanchard & Company upon the Montauk Coal Company, and which John C. Haddock indorsed. When Haddock was sued by Haddock, Blanchard & Company he denied that he had indorsed the draft for the accommodation of the coal company, but the undisputed evidence was to the effect that he had so indorsed for its accommodation.

The Negotiable Instruments Law provides that an irregular indorser is liable in accordance with the following rules: 1. If the instrument is payable to the order of a third person, he is liable to the payee, and to all subsequent parties. 2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Haddock contended also that as the draft was payable to the drawer, under subdivision 2, above set forth, he was liable to all parties subsequent to the drawer, but not to the drawer.

The court held in this case that according to the universal rule of law, the acceptor of a draft becomes the primary obligor by acceptance, and when the draft is accepted the drawer of the draft, if it is

Digitized by Google

payable to him, becomes the payee. The draft after its acceptance is practically a promissory note payable by the acceptor to the payee. The payee, Haddock, Blanchard & Company, become an indorser of the draft, and John C. Haddock also indorsed. Under the Negotiable Instruments Law the indorsers are liable prima facie in the order in which they indorse, but evidence is admissible to show as between themselves they have agreed otherwise. The evidence adduced in this case showed that Haddock, Blanchard & Company and John C. Haddock had agreed otherwise as to their liability on the note than the one which prima facie appeared to be their liability. The court allowed parol evidence to be introduced to show in what order they were liable as between themselves.

The judgment in favor of the plaintiff was affirmed by the Appellate Division and the Court of Appeals.

The court said in part:

"There has always been conflict among the courts of the several States both in asserting the principles upon which irregular indorsers upon commercial paper are to be held and in the conclusion arrived at in the particular cases litigated. The number of cases is so great, and the possibility of even a partial reconciliation of them so remote, that we will confine our citation of authorities wholly to those in this State. It was well settled in this State for many years prior to the enactment of the Negotiable Instrument Law that a person who puts his name on the back of a bill or note before its delivery is presumably a second indorser and not liable to the payee, but the presumption could be rebutted by parol evidence to show that the intention of the indorser was to become surety for some prior party to the instrument. The Negotiable Instruments Law was first enacted in this State in 1897. Laws 1897, p. 734, c. 612. Section 113 of the said law provides: 'A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.' The defendant was within this definition an indorser of each of said instruments. Section 114 of the said law provides: 'Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.' By this section of said law the presumption as established by the courts in this State was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute. Questions relating to the sufficiency of the pleadings are settled by the statute. A complaint upon a note or bill, without alleging a colateral agreement between the parties whose names are on the instrument, seeking to recover against a person, except as provided by the statute, would clearly be demurrable. The

Digitized by Google

note of the Lenape Coal Company was payable to plaintiff, a third person, and the defendant, according to the provisions of said section 114, is liable to the plaintiff, the payee therein. No serious contention has been made to the contrary. The serious question for consideration arises from the fact that the bills were payable to the maker and drawer thereof, respectively, and the defendant, as an indorser thereon before delivery, is not under the statute prima facie liable thereon to the plaintiff. Should parol evidence have been allowed to show the intent of the parties? We have not discovered any exception to the rule as established by the courts of this State allowing parol evidence as between the parties whose names appear on the bill or note to determine their liability as between themselves. It is frequently stated that where a note is payable to a person other than the maker, and is indorsed by a third person before delivery, the intention of the indorser is ambiguous and uncertain on the face of the paper, and such uncertainty justifies the receipt of parol evidence to determine the true intention of the parties. We do not see that any greater certainty exists upon the face of a bill as to the true intention of the parties, where it is drawn to bearer or to the order of the maker, and it is indorsed by a third person after acceptance by the acceptor and before delivery to the payee and maker. There is a certain rule of presumption determined by common law or by statute, but the alleged reason for the rule in either case is not very apparent. The long-established rule to allow parol evidence that the intention of the parties may prevail seems to have met with somewhat general approval, without discussing specifically the principles upon which such evidence is admitted.

"It is said by Daniel in his work on Negotiable Instruments (5th ed, § 710): 'Whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur, though not with entire unanimity, that as between the immediate parties the interpretation ought to be in every case such as will carry their intention in effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction.' Story on Promissory Notes, § 479. In Good v. Martin, 95 U. S. 90, 24 L. Ed. 341, the court say: 'Considerable diversity of decision, it must be admitted, is found in the reported cases, where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and bfore it is delivered to take effect; the question being whether the party is to be deemed an original promiser, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed. Denton v. Peters, L. R. 5 Q. B. 475. Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation and giving the court the same advantages for construing the contract which were possessed by the actors. Cavazos v. Trevino, 6 Wall. 773, 18 L. Ed. 813.' It must constantly be borne in

Digitized by Google

mind that the acceptance of a bill makes the acceptor the principal debtor. A bill, when accepted, becomes similar to a promissory note; the acceptor being the promiser, and the drawer standing in the relation of an indorser. Daniel on Negotiable Instruments (5th ed.) 532. There is nothing in the Negotiable Instruments Law to indicate an intention on the part of the legislature to change the rule as established in this State relating to the receipt of parol evidence to determine the primary liability as between the persons whose names appear upon the instrument or as between those secondarily liable thereon. By section 55 of the Negotiable Instruments Law it is provided: 'An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.' Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated. The plaintiff was the holder of the note for value, and the evidence showed that the defendant was an accommodation indorser for the benefit of the acceptor. The last subdivision of section 114, as we have quoted, makes parol evidence necessary to establish whether the indorser signed the instrument for the accommodation of the payee. It is true that this section does not expressly state that, if the indorser signed for the accommodation of the acceptor, he is liable to all parties subsequent to the acceptor; but the fact that such a provision is not included in section 114 does not prevent the admission of parol evidence to determine generally the questions relating to an accommodation party as provided by section 55. The Negotiable Instruments Law by section 7 provides: 'In any case not provided for in this act the rules of the law merchant shall govern.' By section 118 of the Negotiable Instruments Law it is provided: 'As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise.' As we have seen, upon the acceptance of the bill the acceptor becomes the principal debtor and the one primarily liable to pay the amount of the bill,and all other parties to the instrument, including the maker and indorser, are secondarily liable. We are of the opinion that the maker of the bill is in legal effect and within the intention of this section an indorser, and that as between the plaintiff and the defendant parol evidence is authorized to determine the liability as between them. Th articles of the Negotiable Instruments Law relating to the presentation of bills and notes for payment and notice of dishonor (articles 7 and 8) further show an intention by the legislature to leave the order of liability among those whose names are on the instrument subject to determination by any competent evidence. Section 130 provides: 'Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. . . . But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.' Section 139 provides: 'Presentment for payment is not required in order to charge the drawer where he has no right to

Digitized by Google

expect or require that the drawee or acceptor will pay the instrument.' Section 140 provides: 'Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.' Section 160 provides: 'Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.' Section 186 provides: 'Notice of dishonor is not required to be given to an indorser in either of the following cases: . . . (3) Where the instrument was made or accepted for his accommodation.' There is no reason that we can conceive why the legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in this State for many years. All of the quotations that we have made from the Negotiable Instruments Law show that it has enlarged rather than restricted the rules allowing parol evidence to show the true liability and relation of the parties whose names appear upon the bill or note in all actions between themselves. It is certainly very material to the drawer of a bill whether an indorser signs it at his request or at the request and for the benefit of the acceptor. We do not think it was the intention of the legislature by the enactment of section 114 of the Negotiable Instruments Law to establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves in an action where the facts showing a different intention are fully alleged. All of the decisions of our courts since the enactment of the Negotiable Instruments Law tends to sustain the views herein expressed. Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658; Kohn v. Consolidated Butter & Egg Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265. In the case last mentioned McAdam, J., said: 'Prior to the statute of 1897, supra, the allegation referred to was a necessary one in such cases, and, if denied, the onus of proving the allegation was on the plaintiff, for the payee was presumably the first indorser. Daniel's Neg. Inst. (4th ed.), § 704; Wood's Byles' Bills 151, note, and cases before cited. Since the statute the legal presumption is changed where the complaint alleged that the irregular indorsers indorsed the paper "before delivery" to the payee; and when this fact is established the onus is cast upon such indorsers to allege and prove that, notwithstanding such delivery, the payee was to become first indorser according to the customary form of the contract, and that they did not indorse for the purpose of lending their credit to the maker or with the intention of becoming liable to the payee. That this is the proper interpretation of the act is obvious. The true intention of indorsers as between themselves can always be shown by oral evidence. Daniel's Neg. Inst., supra; 4 Am. & Eng. Encyc. of Law (2d ed.) 492 et seq.; Guild v. Butler, 127 Mass. 386; Cady v. Shepard, 12 Wis. 639; Benjamin's Chambers' Bills (2d Am. ed.) 250; Witherow v. Slayback, 158 N. Y. 649, 58 N. E. 681, 70 Am. St. Rep. 507. To go further, and decide that the statute intended to create an incontestable liability against irregular indorsers, would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interest of law reform.'"

See Decision No. 1119.

Digitized by Google

Bills and Notes: Consideration: Broker's Services.

In the State of Nebraska a statute provides that a contract for a real estate broker's commission is unenforceable unless such contract is in writing. In the suit under consideration a promissory note was given to a real estate broker for having effected a sale of 480 acres of land. The liability of the maker on the note was contested on the ground that the maker executed the note in consideration of the broker's commission. The judgment was in favor of the defendant, the maker of the note, and the real estate broker, the payee of the note, appealed, and the judgment was rversed. The court held that, although the statute in regard to broker's commissions had been sustained by the decisions of the State on numerous occasions, the services of a broker constituted a sufficient consideration for a promissory. The court held that this statute was simply passed for the purpose of preventing perjury and fraud. In other words, that a real estate broker could not recover for his services, unless the contract employing him was in writing, but where the broker's client recognized his liability for the broker's services and executed a promissory note in consideration of them, the note was enforceable against such maker.

The court said in part:

"Now, we have presented the question whether such services constitute a sufficient consideration for a written promise to pay. Like the satute of frauds, of which it is a virtual extension and enlargement, it was designed to exclude oral testimony as a means by which the rights of litigants could be determined in certain cases where experience has shown that it was particularly liable to abuse. Baker v. Gillian, supra. To make a concrete application of the reason for the law, the legislature, promising that a liability might be wrongfully imposed upon a defendant upon false testimony if it were permitted to be established by oral evidence, has provided that he shall not be charged except upon a written contract subscribed by himself. When, however, the defendant, after receiving the benefit of services, executes a written promissory note in payment thereof, it would seem that the reason of the law was fulfilled. The contract is then established by his own signature. The object of the statute is, as we have seen, to prevent frauds and perjuries, and, while certain contracts are by the terms thereof declared void, the uniform construction placed upon the statute by the courts renders it not void, but merely unenforceable. Riley v. Bancroft's Estate, 51 Neb. 864, 71 N. W. 745. It is within the principle laid down by Baron Parke in Earle v. Oliver, 2 Exch. 71, that, 'where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it.' The doctrine has been applied to cases where the consideration of a contract made by a feme sole was an unenforceable

Digitized by Google

$10,000 00/100 Philadelphia, Pa July 2d 1903

Four months after date we promise to pay

to the order of Lewis Luckenbach

Ten thousand Dollars

Payable at 1336 Beach St. Philadelphia,

~~Negotiable~~ Without defalcation for value received.

Holden Regulated Sewing Machine Co

Henry P. Kingsley Pres't

No. Due

Frank J. McDonald Sec'y.

COLUMBIA BOND

Digitized by Google

Henry J. Kunzig
Frank J. McDonald
Sommers J. Smith

The payee of this note, Lewis Luckenbach, sued the indorsers above named. It transpired at the trial that the maker of the note, the Holden Regealed Ice and Machine Company, being in need of funds, appealed to Mr. Luckenbach, who loaned the corporation $10,000 upon the understanding that Kunzig, McDonald and Smith, who were officers, also directors and stockholders in the corporation, would indorse the note. The note was not presented for payment at its maturity, and no formal notice of dishonor was given the indorsers. Luckenbach sued the indorsers, and the defense was that being indorsers they were released from liability on the note because the note was not presented for payment and no notice of its dishonor given to them. The court, however, directed a verdict in favor of the plaintiff. A motion was made by the defendants, the indorsers, to set aside the verdict, but the motion was overruled. The court held that presentment and notice were not necessary, for the reason that the Negotiable Instruments Law provides that presentment for payment is not required to charge an indorser where the instrument was made for his accommodation, and he had no reason to expect that the instrument will be paid if presented. The facts of this case showed clearly that the note was executed for the accommodation of the indorsers. Furthermore, the indorsers were officers of the corporation, the maker, and knew the corporation had no funds with which to meet the note at its maturity. No knowledge, which they did not already possess, would have been given them by notice of the instrument's dishonor.

Digitized by Google

contract made by her whole covert, as well as to cases where the consideration was an oral promise to answer for the debt of a third person unenforceable by reason of the statute of frauds. Goulding v. Davidson, 26 N. Y. 604; Rogers v. Stevenson, 16 Minn. 68 (Gil. 56); Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279."

See Decision No. 1120.

Bills and Notes: Presentment for Payment and Notice of Dishonor: Indorser's Liability.

The Holden Regealed Ice and Machine Company, the maker of the illustrated promissory note, had no assets except two contracts, which were considered valuable by the board of directors of the company, composed of Henry J. Kunzig, Frank J. McDonald, Sommers J. Smith and Franklin S. Horn. In order to complete the contracts the company needed money, and Lewis Luckenbach, the payee named in the note, furnished it. The note was indorsed by Henry J. Kunzig, Frank J. McDonald and Sommers J. Smith. The money was loaned on the strength of the indorsement of Kunzig, McDonald and Smith, all of whom were stockholders and directors of the corporation, which was the maker of the note. The note was not paid at its maturity, and was not presented for payment to the corporation and no notice of its dishonor was given Kunzig, McDonald or Smith. Kunzig, McDonald and Smith knew the corporation had no funds with which to pay the note. In Luckenbach's suit against the indorsers, McDonald, Kunzig and Smith, the court directed a verdict in favor of the plaintiff, Luckenbach, holding that presentment was not necessary for the reason that the note was made for the accommodation of the indorsers. They were the officers of the corporation that was to pay it and knew all the facts which would have been disclosed to them by a notice of dishonor. The defendants made a motion to set aside the verdict, but this motion was overruled.

The court said in part:

"At the argument on this motion it was argued that under the Negotiable Instruments Act of Pennsylvania of May 16, 1901 (P. L. 206), the defendants could only be held as indorsers under section 63 of the act, which provides: 'A person placing his signature upon the instrument other than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be found in some other capacity.' If there was no other evidence in the case except the note itself, with these defendants appearing as they do upon the back of the note as indorsers, of course, this section would apply, and they could not be held in any other capacity. It would then have been necessary for the plaintiff to prove presentment and notice. But this section has no application, because the uncontradicted evidence, aside from the note, shows that the case

Digitized by Google

falls within sections 80 and 115 of the Negotiable Instruments Act. It is provided in section 80 that: 'Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he had no reason to expect that the instrument will be paid if presented.' And section 115 provides that: "Notice of dishonor is not required to be given to an indorser in either the following cases: . . . (2) Where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation.' The evidence shows that the indorsers were the real parties in the transaction, and the name of the ice company was only used for the purpose of carrying out the transaction between the indorsers and the lender. The plaintiff, if he had endeavored to present the note at maturity, would necessarily have presented it to either Kunzig or McDonald. These men knew there were no other parties who could pay the note but themselves in any capacity, and they had all the information which they could have received if every formality required by the law had been complied with. For these reasons the motion for judgment non abstante veredicto is overruled."

See Decision No. 1121.

Banks and Banking: Forgery: Depositor's Duty to Notify Bank of Forged Checks.

The plaintiff in this action, McNeely Company, had an account with the defendant, the Bank of North America. During a period of nearly six years, prior to February 24, 1903, an employee of the McNeely Company forged the names of payees upon ninety checks issued by the company. During this period the McNeely Company's bank book was balanced seventy-six times, and all the checks including the forged checks were returned to the company. Some of the forgeries were discovered on January 1, 1904, and the bank book of the company was balanced three times after that before the bank was notified of the forgeries. The bank was not notified of the forgeries until April 11, 1904. The court in this case held that it is the depositor's duty to notify the bank promptly of a forgery, and in case it does not, the courts will assume that the bank has been injured by the delay; that the bank might have recouped from some source, either from funds of the forger or the forger's friends, and it is not necessary for the bank to prove that it would have derived benefit from an earlier notification. In other words, it is not necessary for the bank to prove its loss caused by the delay to prevent the depositor's recovery.

Of course, each one of these forgery cases will be determined by the circumstances surrounding the case. What is and what is not a reasonable time, within which a depositor should notify a bank of a forgery, will be determined by the circumstances of each particular

Digitized by Google

case; but the courts have universally laid down the law that it is the depositor's duty to notify the bank promptly of a forgery, and in case the bank suffers a loss by the non-notification, the depositor cannot recover from the bank. The presumption, as laid down in this case, is that the bank has suffered loss by reason of a delay in notification.

The court said in part:

"The relation between a bank and its depositor is a contractual one. Its undertaking with its depositor is to pay his checks, if he has sufficient funds with it for that purpose, and it assumes all the risk as against him of a mispayment in paying and charging to his account a check which he has not signed or one which he has signed bearing a forged indorsement of the payee. To his account it may not charge such a check. If it does, the depositor can recover from it the amount so charged. No payment by a bank on a forged signature of a depositor as drawer of a check or on a forged indorsement of his payee can affect him. His right is to get back from the bank whatever he has deposited with it, less what has been properly paid out on his orders. The responsibility of the bank to the depositor is absolute, and it can retain no money deposited with it by him to reimburse it for any mispayment it has made out of such deposit; but it can recover from a forger responsible for the mispayment, or from those who, by their indorsement of a check, have vouched for previous indorsements or the genuineness of the signature of the alleged drawer. The right of a bank to recover from a forger, or from those to whom it may have paid a check bearing the forged signature of one of its depositors, or a forged indorsement, is its only remedy for the fraud practiced upon it by the forgery. The depositor's money is not affected by it, and when he is the first to discover it, it is not reasonable that he should not be required to give prompt notice of it to the bank, if he intends to hold his depository liable for the mispayment, and this without regard to what may or may not result from a prompt effort to recover from the party or parties who may be liable to the bank for the mispayment. The depositor can gain nothing by withholding knowledge of the forgery, but the bank, if kept in ignorance of it after his discovery of it, may lose everything. As soon as a bank learns that it has paid a check on a forged signature of a depositor, or on a forged indorsement on his check, it is its duty to promptly restore to the depositor's account what was improperly taken from it, and its right at the same time is to proceed against those who wrongfully got the money. This right is to proceed immediately, and to the promptness with which a bank is able to exercise it recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceeed promptly for its own protection. It may or may not be able to recover from the forger bv promptly proceeding against him, but its right is to try by so proceeding; and, when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for by withholding from it what he has discovered he can, as just stated, gain nothing, but may lose all. A forger may be insolvent or beyond the

Digitized by Google

reach of civil or criminal process, but, by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from its knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right. When an indorser on a promissory note defends on the ground that prompt notice was not given him of its non-payment, the holder will not be heard in reply that if notice of the non-payment had been promptly given it would not have helped the indorser, because he could have recovered nothing from the maker of the note or prior indorsers. The right of the indorser on a note is to prompt notice of its non-payment, that he may have an opportunity of proceeding promptly against the maker or prior indorsers, without regard to what may result from his efforts, and, if this right is not given him, his liability is at an end. 'The insolvency of the maker of a note, though known to the indorser, ought not to discharge the holder from giving notice. There are various degrees of insolvency, and it rarely happens that a man is totally insolvent. So that there is a chance of getting something for an application to the debtor. Besides, if a man has nothing of his own, he may have friends who, to relieve him from pressure, will do something for him. The indorser, therefore, has a chance of securing himself, at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice is that notice could be of no use to the indorser; but it is almost impossible to prove that it might not have been of use. Therefore it is necessary.' Barton v. Baker, 1 Serg. & R. 334, 7 Am. Dec. 620. Why should a different rule apply to a bank, which never knowingly pays on a forgery, but, in cases like the one now before us, is always an innocent victim? Delay by a depositor in giving notice to a bank means not only its enforced delay in proceeding against those liable to it, but means loss of evidence as well; and, if the rule for which appellant contends should prevail, a bank might be deprived of the opportunity of showing that prompt proceeding on its part would have resulted in its recovering for its loss. And, again, in a suit brought by a depositor against a bank to recover the amount which it may have improperly paid on a forgery, the issue is the forgery. This issue ought not to be complicated with another, and a speculative one, as to whether anything might have been recovered from the forger if prompt notice had been given to the bank of the forgery. The only reasonable and logical rule is the one adopted by the referee and the court below. Our own cases are in harmony with it, and it is approved by high authority. A different one would be putting a premium upon the laches of a depositor, and give to a dishonest one opportunity to help a forger to escape.

"A very learned referee in United Security Life Insurance & Trust Company of Pennsylvania v. Central National Bank of Philadelphia, 185 Pa. 586, 40 Atl. 97, in his report, confirmed by the court, held that the plaintiff was not entitled to recover from the defendant the amounts paid and charged to its account on forged indorsements,

Digitized by Google

because it had not promptly notified the defendant of the forgeries after it had what the referee held to be constructive notice of them. The judgment was reversed solely on the ground that the referee had erred in finding that the plaintiff had had constructive notice of the forgeries on March 27, 1894, and judgment was directed to be entered for it, because when it actually discovered the forgeries on May 17, 1894, it gave immediate notice to the defendant. What the referee said and what was not held to be error was: 'The referee is of the opinion that it is not necessary for the defendant to make effective the defense based upon the want of diligence of the plaintiff in giving notice of the forgery to show with certainty that had notice been given at an earlier day a fund belonging to Williams (the forger) was in existence which could have been attached and held. When it is once shown that the plaintiff failed to give prompt notice of the discovery of the forgery, the plaintiff's right of action is gone. The law assumes, and does not find it necessary to conduct an inquiry to verify the assumption, that, had the notice been given promptly, the Central Bank might have taken steps to protect itself as against Williams.' A sentence from the opinion in Iron City National Bank v. Ft. Pitt. National Bank, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615, is pointed to by counsel for the appellant as an expression from this court sustaining their contention. In that case the present chief justice did say that all a bank which has paid a forged check of one of its deposits 'need do in any case is to give notice promptly according to the circumstances and the usage of the business, and, unless the position of the party receiving the money has been altered for the purpose in the meantime, it would seem that the date of notice is not material.' This must be read with reference to the facts in that case. As to those in the present one, it is not applicable. There the Fort Pitt National Bank, the defendant, which received the money on the forged check, had paid it out on the check of its depositor, to whose credit it had been placed, and all that we meant to say was that if the bank had not paid it out, and could still have protected itself by withholding it, the date of the notice of the forgery would not have been material. The rule followed by the learned referee and court below is the only reasonable, logical and proper one in this class of cases. It is approved by the Supreme Court of the United States in Leather Manufacturers' Nat. Bank v. Morgan et al., 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, where it is said by Harlan, J.: 'If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed or subsequently property sufficient to meet the demands of the bank. . . . As the right to seek and compel restoration and payments from the person committing the forgeries was in itself a valuable one, it is suffi-

Digitized by Google

cient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be effectively, exercising it. Continental Bank v. Nat. Bank of the Commonwealth, 50 N. Y. 583; Voorhis v. Olmstead, 66 N. Y. 113, 118; Knights v. Wiffin, L. R. 5 Q. B. 660; Casco Bank v. Keene, 53 Maine, 103; Fall River Bank v. Buffinton, 97 Mass. 498.'"

See Decision No. 1122.

Bills and Notes: Accommodation Maker: Release from Liability of Accommodation Party.

The plaintiff, Daniel Wolstenholme, as administrator of the estate of James Megeath, is the holder of a note in effect the same as the illustration. The decedent received the same from Joseph P. Megeath, who is named therein as payee and who indorsed to the order of the plaintiff's decedent. The note is made by Grant H. Smith and J. E. Darmer. J. E. Darmer was an accommodation maker, having received no consideration and having signed as maker for the accommodation of Grant H. Smith, which fact was known to the payee, Joseph P. MeGeath, and also James Megeath, the indorsee of Joseph P. Megeath. The note was not paid at its maturity, and the administrator of the estate of James Megeath sued the two makers and obtained a judgment in his favor against them. The defendant, J. E. Darmer, appealed, contending, among other things, that an agreement between the holder and Smith had been made to extend the time of payment of the note, and that he was thereby released under the Negotiable Instruments Law. This act provides that a party secondarily liable, among other ways, is discharged by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. Darmer contended that this agreement between the holder and Smith to extend the time of payment of the note, which was made without his assent, released him. The decision turned upon the point as to whether or not Darmer was a party secondarily liable. If he was a party secondarily liable, he would be released by such an agreement. If, on the other hand, he was primarily liable on the note, he would not be released by the agreement. The court in this case held that under the Negotiable Instruments Law an accommodation maker is a party primarily liable; that his contract is as maker and principal debtor, and by the terms of the instrument he is absolutely required to pay it. A judgment in favor of the plaintiff against both of these makers of the note was therefore affirmed.

The court said in part:

Digitized by Google

Salt Lake City, Utah, Sept. 13, 1901.

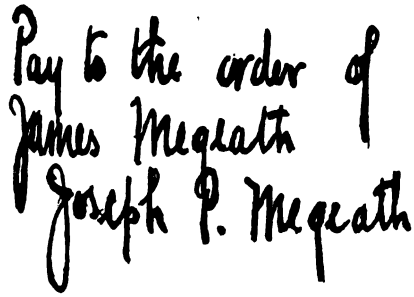
Sixty days after date, without grace, for value received, we or either of us promise to pay to the order of Joseph P. Megeath, three hundred dollars ($300.00) in United States gold coin, negotiable and payable at the bank of Commerce, at Salt Lake City, Utah, without defalcation or discount, with interest at the rate of one per cent. per month from maturity until paid, both before and after judgment, and if suit be instituted for the collection of this note we agree to pay thirty dollars ($30.00) attorney's fee.

Grant H. Smith

J E Garner

Accommodation Maker: Persons Primarily and Secondarily Liable.

Digitized by Google



The administrator of James Megeath recovered a judgment against both of the makers of this note, Grant H. Smith and J. E. Darmer. Darmer appealed from the judgment against him. He signed this note as an accommodation party for the accommodation of Grant H. Smith. No consideration passed to him. This fact was known to the payee, Joseph P. Megeath, and to the payee's indorser, James Megeath. An agreement was made by the holder of this note and Grant H. Smith extending the time of payment, and Darmer contended that he was discharged by this agreement. Section 120 of the Negotiable Instruments Law provides: "A person secondarily liable on the instrument is discharged: VI. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." The court, to which Darmer appealed, held, in affirming the judgment, that he was not released by the agreement between the holder and Smith, for the reason that he was a party primarily liable upon the note. If he had been a party secondarily liable he would have been released. Under the former decisions of the courts in the State of Utah Darmer would have been considered a party secondarily liable; but under the Negotiable Instruments Law, he is primarily liable because he is absolutely required to pay the note.

Digitized by Google

"There is no doubt that under the decisions of this court prior to the enactment of chapter 83, page 122, Laws 1899, relating to negotiable instruments, the facts alleged in the answer and found by the court constituted a defense, and discharged Darmer. It was the law generally in this country that a binding agreement between the principal and holder of a negotiable instrument, whereby the time of its payment was extended, relieved the surety, though he apparently signed as maker, if the holder had knowledge or notice that he was in fact a surety. It is, however, contended by the respondent that the law in this respect has been changed by the act in question. On the other hand, the appellant contends that it has not been changed, and that the law in this regard is now as it was before the enactment. We cannot agree with appellant in this contention. The Negotiable Instruments Law enacted in 1899 is like that of the Bills of Exchange Act of 1882 of England, and of the Negotiable Instruments Law of New York, adopted in 1897, and of about nineteen other States. The particular sections pertinent to the question are:

"Section 29: 'An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.'

"Section 120: 'A person secondarily liable on the instrument is discharged: I. By an act which discharges the instrument. II. By the intentional cancellation of his signature by the holder. III. By the discharge of a prior party. IV. By the valid tender of payment made by a prior party. V. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved. VI. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.'

"Section 192: 'The person "primarily" liable on an instrument is a person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.'

"By subdivision 6 of section 120 it will be seen that a person secondarily liable on the instrument is discharged by an agreement binding on the holder to extend the time of payment. If, therefore, the appellant was only secondarily and not primarily liable on the instrument, he is discharged. Otherwise not, unless the instrument was discharged. Section 192 makes a person primarily liable on the instrument who by the terms of the instrument is absolutely required to pay it. And by section 29 an accommodation party in fact is liable on the instrument to the holder, notwithstanding such holder at the time of the taking of the instrument knew him to be only an accommodation party. Messrs. Eaton & Gilbert, authors of recent work on Negotiable Paper, in considering the Negotiable Instruments Law in question, say in section 123f: 'The statute only provides for the discharge by an extension of time of a person secondarily liable on the instrument. By the terms of the statute a person is primarily liable who by the terms of the instrument is absolutely required to

Digitized by Google

pay the same. All others are secondarily liable. An accommodation maker or acceptor is absolutely liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. It would seem to follow that the statute has disposed of the conflict of authority upon this question by holding the accommodation acceptor or maker to his apparent engagement as a principal debtor, and making him liable notwithstanding an indulgence given to the indorser or drawer for whose benefit he became a party to the instrument.' The same question raised here was considered in the case of Cellers v. Meachem, (Oregon) 89 Pac. 426, 10 L. R. A. (N. S.) 133, and the conclusion was there reached that, under the new law, an accommodation maker was primarily liable, notwithstanding any knowledge the holder of the instrument might have had as to his relationship with the principal. To the same effect are the cases of Vanderford v. Farmers & Mechanics' Nat. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129, and National Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422. Under the new law the appellant's apparent engagement as a maker and principal debtor is his real and actual engagement. He signed the note as a maker. By the terms of the instrument he is absolutely required to pay it. The statute in such case makes him an actual principal and renders him primarily liable, though in fact he received, with the knowledge of the holder, no part of the consideration, and only signed the note for the purpose of lending his name to another. Having signed the note as an apparent maker and principal debtor, he cannot thereafter be heard to assert the contrary so as to affect his liability on the instrument."

See Decision No. 1123.

Banks and Banking: Unauthorized Indorsement by Agent: Payment of Check.

A man by the name of Beasley was indebted to Joseph L. Robinson, the plaintiff in this action, in the sum of $77.65, upon a promissory note. Joseph L. Robinson gave the note to a Miss Josephine Hawkins, with a written order directed to Mr. Beasley authorizing him to pay the money to Miss Hawkins. In other words, Robinson constituted Miss Hawkins as his agent in the collection of the money. Beasley gave in settlement of the note a check drawn to the order of the plaintiff, Robinson. Miss Hawkins presented the check to the bank, upon which it was drawn, the defendant in this action, and the bank would not pay the money unless the check was indorsed. Miss Hawkins indorsed Robinson's name and received the money, which she converted to her own use. Robinson sued the Bank of Winslow, the defendant, and the trial court rendered a judgment in favor of the bank, which judgment was reversed on appeal. Of course, if Miss Hawkins had no authority to indorse the name of Joseph L. Robinson, who is named as the payee of the check, the

Digitized by Google

bank could not have acquired good title to the check, and the money could have been recovered by the plaintiff. The case turned on the question of whether or not Miss Hawkins, in acting as agent for the plaintiff in the collection of the money due upon the note, had also authority to indorse the plaintiff's name to the check received in payment of the note. The Appellate Court held that she did not have such authority.

The court said in part:

"The question presented is simply one of agency. Was Miss Hawkins appellant's agent to indorse negotiable paper given in settlement of a debt due appellant? If she was such agent, the apropriation of the proceeds to her own use was a mere breach of trust, and would not affect appellee. In 1 Parsons on Contracts (6th ed.), § 62, the author says: 'An agent's acts in making or transferring negotiable paper (especially by indorsement) are much restrained. It seems that they can be authorized only by express or direct authority, or by some express power which necessarily implies these acts, because the power cannot be executed without them.' In Mechem on Agency the author says (at section 382): 'If an agent is authorized to accept checks in payment of the demand, he has no implied authority to indorse them and collect the money thereon, and the bank paying the check so indorsed is still liable to the principal for the amount thereof.' The learned author cities in footnotes the following cases which support the proposition: Graham v. U. S. Savings Inst., 46 Mo. 186; Robinson v. Chemical Bank, 86 N. Y. 404; Milliard v. Rep. Bank, 3 McArthur (D. C.) 54; McClure v. Evartson, 14 Lea (Tenn.) 495; Holtzinger v. Nat. Bank, 6 Abb. Prac. N. S. (N. Y.) 292; Hogg v. Smith, 1 Taunt. 347. The check required the bank to pay the sum specified to such person as the payee might direct. The payee did not direct the payment to any one, unless Miss Hawkins was agent for that purpose. Such agency is not inferable from the mere fact that she was his agent in effecting the collection. Graham v. U. S. Savings Inst., supra. Had the check been payable to Miss Hawkins, she would not have acted in violation of her duty in reducing it to money. Walter v. Bennett, 16 N. Y. 250. Agency rests on contract, express or implied. It is general or special. It is special when both the end and the means are specific. The authority in the case at bar was to receive the money; the means, to surrender the note. Had the agent been authorized to accept a check, instead of the money, she would not, as we have seen, had authority to indorse it. The law makes it the duty of every one who deals with a special agent to ascertain the extent of the agent's authority before dealing with him; otherwise, he deals with such agent at his peril, and the principal will not be bound by any act which exceeds the particular authority given. Cruzan v. Smith, 41 Ind. 288. Appellee knew the indorsement was written by Miss Hawkins. No diligence was used in ascertaining her authority to act in the premises, although appellant lived only six miles away, and could have been communicated with by telephone."

See Decision No. 1124.

Digitized by Google

Sales: Bills of Lading: Factors: Protection of Persons Dealing with Factor.

The defendants in this action are bankers doing business under the firm name of Knauth, Nachod & Kuhne. They had an arrangement with the corporation, the English-Greene Company, by which they agreed to make advances to this company upon sales made by the company to its customers. The English-Greene Company was engaged in the business of buying and selling cotton yarns as commission merchants for the manufacturers or as middle men buying from the manufacturers and selling to consumers. It ordered from the plaintiff in this action, Kinston Cotton Mills, some material, and thirteen shipments were made under the order. The bills of lading for twelve of these shipments were made out to the bankers, Knauth, Nachod & Kuhne, and the other bill of lading was made out to the English-Greene Company. All the bills of lading were, however, sent to the English-Greene Company. On the trial the treasurer of the plaintiff testified that the Kinston Cotton Mills looked to the English-Greene Company for the payment of the bills, and that the said company was charged with the amount of each shipment on the books of the plaintiff. The Kinston Cotton Mills drew two drafts upon the English Greene Company for the goods shipped, neither of which drafts was paid at its maturity. The English-Greene Company went into involuntary bankruptcy. Knauth, Nachod & Kuhne made efforts to collect the amounts due upon the invoices from the customers of the English-Greene Company, which had been pledged to them for their advances. They succeeded in collecting only about 30 per cent. of the face value of the invoices and sold the balance at auction for a nominal sum. The Kinston Cotton Mills, the plaintiff, endeavored to recover from the defendants, the bankers, on the theory that the defendants had collected money which belonged to the plaintiff; that the English-Greene Company was only the selling agent for the Kinston Cotton Mills, and the money due from the purchasers of the goods should be paid to it, less any commission, to which the English-Greene Company might be entitled. The circumstances surrounding the case is just as favorable to the theory that the goods were actually sold to the English-Greene Company, as to the theory that the English-Greene Company was simply the selling agent of the plaintiff. The court determined the question involved by invoking the factor's act, which provides in substance that every factor who is entrusted with a bill of lading is to be deemed the true owner of the merchandise so far as to give validity to any contract made by such agent with any person for the sale or disposition of the whole or any part of such merchandise for any money advanced — upon the faith thereof. In this case the banking house of Knauth, Nachod & Kuhne advanced

Digitized by Google

money to the English-Greene Company upon the faith of the possession by the English-Greene Company of the evidence of title to the goods, the bills of lading. Sales having been made and part of the money collected, the banking firm was allowed to keep the money which it had collected.

The court said in part:

"'Every factor, or other agent entrusted with any bill of lading, custom-house permit or warehouse keeper's receipt for the delivery of any such merchandise . . . shall be deemed to be the true owner thereof so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced . . . upon the faith thereof.' Chapter 179, p. 203, § 3, Laws 1830; 2 Birdseye's Rev. Stat. (3d ed.), p. 1415, § 1.

"This statute has been much discussed by the courts in this State, and is deemed to be one to be liberally construed. Its purpose is to make certain and apply to commercial transaction the general common-law rule that, where one of two innocent persons must suffer loss from the act of a third person, such loss shall be borne by him who has placed the third person in the position which enabled him to do the act causing the loss. Cartwright v. Wilmerding, 24 N. Y. 521; Blydenstein v. N. Y. Security & Trust Co., 67 Fed. 469, 15 C. C. A. 14. Substantially this statute left the owner to use his precautions when he selected his factor, thereafter leaving him to be responsible for the acts of his agent, and protecting a bona fide third person in any transaction fairly effected with the apparent owner. Cartwright v. Wilmerding, 24 N. Y. 532. Following the terms of the statute, we find that the English-Greene Company, as agent of plaintiff, was 'entrusted with the possession of the bills of lading for the delivery of' the yarn. These bills of lading were in every case sent to them. It is true that they were in all cases, save one, made out to defendants as consignees, but this was done at the request of the English-Greene Company, and, so far from taking the case out of the statute, this circumstance served rather as a warning and intimation to plaintiff that the English-Greene Company were dealing with the property and perhaps obtaining advances thereon, for the treasurer of the plaintiff testified:

"'At the time that the Kinston Cotton Mills had the name of Knauth, Nachod & Kuhne put upon certain bills of lading, I supposed that they were connected in some way with the English-Greene Company. I didn't know in what way. I didn't presume that they were the purchasers of the goods which were shipped or marked for them. I did not expect that they were. I did not know them as users of cotton yarn. . . . My expectation was that they had some financial connection with the English-Greene Company, but I did not know what it was.'

"The plaintiff therefore entrusted the English-Greene Company with the possession of bills of lading, made out to them or their nominees, for the delivery of the goods. Thus far the transaction comes clearly within the statute. Were the advances made 'upon the faith thereof?' These words have received judicial construction. 'I

Digitized by Google

have therefore no doubt that on the faith thereof' at the end of the third section of the New York Factors Act, means on the faith of the possession by the factor of the goods, or their evidence of title previously mentioned therein, with the owner's consent; that 'on the faith' means relying on them as evidence of authority to make the disposition made by the contract, in the absence of evidence or notice of anything to the contrary; that the mere notoriety or avowal of a person's business being only that of a factor is no proof of the precise authority of such factor in a particular case, nor is it a fact which would put the person dealing with such factor upon inquiry as to the precise nature of his authority, when that precise nature is immaterial, or make him assume at his peril the duty of proving it.' Pegram v. Carson, 10 Bosw. (N. Y.) 505. See, also, Cartwright v. Wilmerding, supra; N. Y. Security & Trust Company v. Lipman, 157 N. Y. 551-562, 52 N. E. 595. That the defendants in fact made their advances upon the faith of the bills of lading is not to be doubted. The next question is whether they had knowledge or notice that the true title was in plaintiff, and that the English-Greene Company were forbidden to obtain advances thereon. Of actual knowledge or notice there is no proof. The court charged the jury that, if they found that defendants had sufficient facts at the time they made advances on said goods to arouse their suspicion as to whether or not the English-Greene Company were the owners of the goods or not, then it was the duty of the defendants to inquire of the plaintiff whether the plaintiff had any interest in said goods, and that the defendants were bound by whatever knowledge such inquiry would have elicited. This, we think, placed upon defendants a burden which the law does not warrant, and which, if sustained, would entirely nullify the purpose for which the Factors Act was passed. The essence of a 'suspicion' is that it is without known facts to support it, and in every case where a person has apparent ownership of goods, either through actual possession or the possession of the muniments of title, there is room for a 'suspicion' that some other person may have an interest therein.

"Even under the original English act, which was less liberal than our present act, because it could not be availed of except by showing that the lender did not know that the factor was not the true owner, and thus cast the burden upon him of showing his lack of knowledge, Lord Tenterden said:

"'A person may have knowledge of a fact either by direct communication or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of these ways is enough, I think, to exclude a party from benefit of the provision of the statute. Slight suspicion I think will not.' Evans v. Truman, 1 Moody & R. 10.

"In that case he left it to the jury to say whether the circumstances were such that a reasonable man and a man of business, applying his understanding to them, would know that the goods did not belong to the pledgor. It was the duty of the plaintiff who had entrusted the English-Greene Company with the indicia of apparent ownership to take steps to protect themselves, especially after they had been advised by the request to consign them to defendants that the English-Greene Company were dealing with defendants with reference to the

Digitized by Google

No.....

PURITAN MFG. COMPANY,

Iowa City, Iowa, April 15th, 1904.

Twelve months after date pay to Puritan Mfg. Company, or order, Ninety-five Dollars, $95.00. Value received and charge to the account of

Accepted L. G. Kramer.

PURITAN MFG. COMPANY.

Per M

To L. G. Kramer,

Michigan City, Ind.

Digitized by Google

Pay Johnson Co.
Savings Bank.
Iowa City Iowa
Puritan Mfg. Co.

Pay any Bank or
Banker or order
Johnson County
Savings Bank
Iowa City, Iowa
William A Fry
Cashier

The Appellate Court of Indiana held this instrument to be a draft, and we think properly so. The Johnson County Savings Bank, which is the holder of this draft, sued the drawee and acceptor, L. G. Kramer, upon his acceptance. He contended that there was a failure of consideration as between him and the Puritan Manufacturing Company, which was a partnership and not a corporation, that drew this draft upon him, payable to the order of itself and which it indorsed to the plaintiff, the Johnson County Savings Bank. The Puritan Manufacturing Company sold to Mr. Kramer some jewelry which he claimed was worth a little more than one-half of what he had agreed to pay and that the sale was induced by fraud, consequently there was a failure of consideration. A defense, however, which is available to the acceptor in an action brought against him by the drawer is not available to the acceptor in an action brought against him by an innocent holder for value, such as the court held the Johnson County Savings Bank to be.

This draft is dated in Iowa and drawn by the drawer in Iowa upon the drawee in Michigan City, Indiana, where it was accepted. It is, therefore, a foreign bill of exchange and is governed by the laws of the State of Indiana.

Digitized by Google

goods, and that defendants were not consumers, but bankers. Whatever duty of diligence there was in the case rested on plaintiff, not upon the defendants, who, in the absence of notice or knowledge, were entitled to rely upon the documentary evidence."

See Decision No. 1125.

Bills and Notes: Draft: Acceptance: Acceptor's Liability.

The accompanying illustration was held by the Appellate Court of Indiana to be a draft. The Puritan Manufacturing Company, which is the drawer, also the payee, and consequently the first indorser, sold some goods to L. G. Kramer, the drawee, who accepted the draft. The Puritan Manufacturing Company was a co-partnership composed of Milbert F. Price and Lewis E. Lyon. The Puritan Manufacturing Company indorsed the draft to the order of the Johnson County Savings Bank. The draft not being paid at its maturity, the Johnson County Savings Bank sued L. G. Kramer upon his acceptance. He set up the defense that the goods which he had purchased of the Puritan Manufacturing Company were not worth the amount which he had agreed to pay for them; that there were fraudulent representations as to their value, and therefore the consideration for the draft had failed. In the trial court a judgment was rendered for the defendant, from which the Johnson County Savings Bank appealed, and which judgment the bank succeeded in reversing. The court held that any defense, which the acceptor of the draft might set up against the drawer, could not be set up against the holder, if he was a holder for value and without notice.

The court said in part:

"The writing in suit is to be regarded not as a promissory note, but as a foreign bill of exchange. Appellee's contract of acceptance of the bill was made in this State, and is governed by the laws of this State. Burnheisel v. Field, 17 Ind. 609; Payne v. Albany, etc., Bank, 3 Ind. App. 214, 28 N. E. 432; Nicely v. Commercial Bank, 15 Ind. App. 563, 569, 44 N. E. 572, 57 Am. St. Rep. 245; Daniel, Neg. Inst., §§ 7, 27, 867.

"In Spurgin v. McPheeters, 42 Ind. 527, it was held that, in a suit by the payee against the acceptor of a bill of exchange, the latter could not avail himself of a want of failure of consideration as between him and the drawer (a third person), or of a set-off in favor of such defendant against such drawer.

"In Hinkley v. Fourth National Bank, 77 Ind. 475, it was held that the element of fraud being absent, in an action by an indorsee of a bill of exchange against the acceptor, the acceptor cannot defend by merely showing that he received no consideration, but the acceptor must also show that there was no consideration between the indorsee who sues and his indorser. See, also, Harger v. Worrall, 69 N. Y. 370, 25 Am. Rep. 206; Galvin v. Meridian National Bank, 129

Digitized by Google

Ind. 439, 28 N. E. 847; Heuertematte v. Morris, 101 N. Y. 71, 4 N. E. 1, 54 Am. Rep. 657; Hoffman v. Bank of Milwaukee, 12 Wall. 181, 20 L. Ed. 366. In First National Bank v. Ruhl, 122 Ind. 279, 23 N. E. 766, which was an action upon commercial paper by a holder through indorsement, it was held that an answer pleading want of consideration was bad because it did not show that the plaintiff was not a purchaser for value and in good faith.

"Whatever might be said of answers setting up the matters stated in the second and third paragraphs, if the action was one brought by the payee and drawer of the bill against the acceptor, they cannot be said to have presented any defense to the action against the acceptor brought by the indorsee, nor in any manner connected with or affected by such matters."

See Decision No. 1126.

Bills and Notes: Checks: Presentment for Payment.

The Negotiable Instruments Law provides that checks must be presented for payment within a reasonable time after their issue or the drawer will be discharged to the extent of any loss he suffers by reason of the delay in the presentment for payment. The courts have universally determined that twenty-four hours is a reasonable time within which a check should be presented for payment, where the parties to the check reside in the same community. If the drawer issues his check on a certain day and the check is delivered to the payee, the payee should present the same for payment within twenty-four hours after its receipt by him, and if he does not, and the bank, upon which the check is drawn, fails in the meantime, and the drawer can prove that he had funds in the bank sufficient to meet the check during this period, the drawer would be released. In this case the defendant gave the plaintiff a check dated October 11, 1907, and drawn on the Borough Bank of Brooklyn to the order of the plaintiff, the defendant being the drawer. The check was received by the plaintiff on October 12, 1907. It was not deposited by a subsequent indorsee of the check until October 23, 1907. It was then deposited in the First National Bank. The drawer, payee, and Borough Bank resided in the same community. The Borough Bank closed its doors before the check was presented for payment, and the drawer of the check, also the defendant in this action, had funds in the bank sufficient to meet the check during all the time it might have been presented for payment and paid. If the check had been presented for payment within a reasonable time, its presentment for payment should have been made before the end of the 13th day of October, 1907, because the check was received by the payee on October 12, 1907. Judgment was rendered in favor of the drawer of the check, the defendant, and was affirmed on appeal.

The court said in part:

Digitized by Google

"Section 322 of the Negotiable Instruments Law (Laws 1897, p. 756, c. 17) provides:

"'A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.'

"The court was justified in the conclusion that the check was not presented within a reasonable time, for the general rule in such a case as this is that the reasonable time ends with the next day after the date of the check. Eaton & Gilbert on Commercial Paper, § 167; Wood's Byles on Bills, 19; Smith v. Janes, 20 Wend. 192, 32 Am. Dec. 527, cited in Carroll v. Sweet, 128 N. Y. 19, 22, 27 N. E. 763, 13 L. R. A. 43. Even although the check was not received through the mail until October 12th, nevertheless the reasonable time for presentation would only be extended until the expiry of October 13th. The fact that the payee indorsed the check to a third party did not extend the period of reasonable time, as between the drawer of the check and the payee. Daniel on Negotiable Instruments, § 1595, and cases cited; Carroll v. Sweet, supra. The mere delay in presentation of the check for payment did not discharge the drawer, save to the extent of his loss caused by it. Section 322, Negotiable Instruments Law; Carroll v. Sweet, supra; Eaton & Gilbert on Commercial Paper, § 167, citing Story on Promissory Notes, § 498. As this action was upon the pre-existing debt for which the check was delivered, the defendant, pleading payment, must show delivery, acceptance, and loss to him through the laches in presentation of the check. Daniel, Neg. Inst., § 1588, citing Syracuse, B. & N. Y. R. R. Co. v. Collins, 3 Lans. 29, affirmed 57 N. Y. 641. The burden would have been upon the plaintiff to show that the drawer had not suffered loss by the laches if the action had been upon the check. Little v. Phenix Bank, 2 Hill, 425; Daniel, supra. I think, however, that the defendant sustained the burden, because he showed delivery, acceptance, that the bank closed its doors, but only twelve days after the receipt of the check by the payee, that all of his other checks had been paid, and that he had throughout the time intervening the drawing of the check and the closing of the bank, and at its close, sufficient funds to meet the check. The closing of the doors of the bank, without any other circumstnces to refute such a conclusion, may well be taken as an act of insolvency, though such act is not conclusive. People v. Oriental Bank, 124 App. Div. 741, 109 N. Y. Supp. 509. And the presumption of insolvency continues. Lawson on Presumptive Evidence, p. 172, and cases cited. After the evidence put in by the defendant, it was incumbent upon the plaintiff, if he could, to meet it; otherwise, the defendant's case justified the judgment pronounced by the court. The check is, however, still extant, and in the hands of the plaintiff, and may be presented at any time to the bank upon which it is drawn."

See Decision No. 1127.

Digitized by Google

Bills and Notes: Holder in Due Course: Collateral Security for Pre-existing Debt.

The plaintiff is Andrew J. Graham and he received a note similar to the illustration from Fred A. Bangs, who indorsed and delivered the same to him. The note not being paid at maturity, Graham sued Henry B. Smith, the maker, and Charles H. Hill, the indorser, and obtained judgment against them, from which they appealed. The judgment was affirmed. Hill transferred the note to the La Fronteriza Mining Company in part payment for shares of stock in the company, which he was induced to purchase by fraudulent representations. The company owing money to the plaintiff, Andrew J. Graham, transferred this note to him, the president of the company, Fred A. Bangs, indorsing the note in blank. The plaintiff claims that he received this note in payment of part of the company's indebtedness to him, whereas the defendants claim that he received this note as collateral security for the pre-existing indebtedness. The court held that under the Negotiable Instruments Law a note transferred as collateral security for a pre-existing indebtedness constituted the holder a holder for value. This would not have been so under the law, as it existed in the State of Michigan prior to 1905, when the Negotiable Instruments Law went into effect. This law provides that a pre-existing or antecedent indebtedness constitutes value and the court held that one who received a negotiable instrument as collateral security for a pre-existing indebtedness was a holder for value to the extent of the amount due him.

The court said in part:

"There was no fraud in the inception of the note. It was given for an actual indebtedness and was unimpeachable between the maker and payee. The fraud alleged arose on the sale of the shares of mining stock. The evidence conclusively establishes the fact that plaintiff had no knowledge, actual or constructive, of any fraud in connection with the note, and that he received it in good faith. If, therefore, plaintiff was a holder for value, he was 'a holder in due course,' as held by the trial judge, and entitled to recover. If, as contended by defendant's counsel, the plaintiff received the note as collateral security for an existing debt, and the Negotiable Instruments Act, Pub. Acts 1905, p. 389, No. 265, has introduced no change in the law as to such instruments, plaintiff was not a holder for value. Burroughs v. Ploof, 73 Mich. 607, 41 N. W. 704; Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051. Section 27 of the act is as follows: 'Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.' Section 29 provides: 'Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemd a holder for value to the extent of his lien.' We are of the opinion that it was the intention of the legislature to change the rule

Digitized by Google

$2500 00/100 Bay City, Mich. Jan 11 1906

Six months after date I promise to pay ~~to the order of~~ Charles H. Hill or order

Twenty five hundred ——— Dollars

Payable at First National Bank of Bay City Mich.

Value received with interest at the rate of six per cent per annum Henry B. Smith

No. _____ Due 7/11-06

COLUMBIA BOND

Digitized by Google

Charles H. Hill

Fred A. Bangs.

The maker of this note, Henry B. Smith, and the above indorser, Charles H. Hill, also the payee, were sued by Andrew J. Graham, who is the holder of this note. Hill proved that he delivered the note to the Mining Company, of which Fred A. Bangs was president, for stock in the company, having been fraudulently induced to buy this stock. The note was transferred by the company to Graham, the company being indebted to Graham in the sum of $5,000. Graham contended that this note was transferred to him in part payment of this indebtedness, while the defendants, Smith and Hill, contended that the note was transferred to the plaintiff, Graham, as collateral security for the pre-existing indebtedness. There is no question about Graham's right to recover, provided he is a holder for value. Under the law as it existed in the State of Michigan prior to the passage of the Negotiable Instruments Law, if it was true that he had received the note as collateral security for the pre-existing indebtedness, he would not have been a holder for value. The Supreme Court of Michigan held that he was a holder for value under the Negotiable Instruments Law, passed in that State in 1905. One section of the Negotiable Instruments Law provides that value is any consideration sufficient to support a simple contract, and that a pre-existing or antecedent indebtedness constitutes value.

Digitized by Google

therefore prevailing in this State 'so that any person to whom a negotiable security has been pledged as collatral would be a holder for value to the extent of the amount due him.' Payne v. Zell, 98 Va. 294, 36 S. E. 379; Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822. See, also, Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed without opinion, 173 N. Y. 596, 65 N. E. 1121."

See Decision No. 1128.

Bills and Notes: Presentment for Payment and Notice: Waiver by Indorser: Negotiable Instruments Law.

The J. W. O'Bannon Company is the payee of a note executed by James Freeman Brown Company and indorsed by James M. Curran. The money was advanced by the O'Bannon Company to the James Freeman Brown Company on the strength of the indorsement of Curran, who was the president of the James Freeman Brown Company. Before the note's maturity the James Freeman Brown Company went into the hands of a receiver and Curran, as president of the company, filed a written admission of the company's inability to pay its debts and its willingness to be adjudicated bankrupt. The O'Bannon Company sued Curran as an indorser on this note and he defended on the ground that no presentment for payment had been made to the maker and no notice of the note's dishonor had been given to him. Before the Negotiable Instruments Law was passed in the State of New York, presentment for payment and notice of dishonor were excused when it could be shown that the omission to give them could not possibly injure the indorser Such injury was presumed, however, until it was made to appear that it could not have resulted. Of course, if this case had been decided under the law, as it existed prior to the Negotiable Instruments Law, the plaintiff could recover for the reason that it was very evident that the omission to present this note for payment and to give the defendant notice of dishonor did not injure him. Under the Negotiable Instruments Law presentment for payment and notice of dishonor are necessary to charge the indorser; but presentment for payment and notice of the instrument's dishonor may be waived. The Appellate Division of the Supreme Court of the State of New York held that the facts of this case were an implied waiver of the presentment and notice. By the defendant's own act as an officer of the corporation, which was the maker, he had consented and co-operated in rendering it impossible for the maker to pay.

The court said in part:

"The Negotiable Instruments Law, however, provides that due presentment and notice of dishonor are necessary to charge an in-

Digitized by Google

dorser (sections 130, 160); but either presentment for payment or notice of non-payment may be dispensed with by waiver, which may be express or implied (section 142, subd. 3; section 180), so that the real question here presented is whether the facts show such waiver.

"I think they do. Prior to the maturity of the notes the maker had been adjudicated a bankrupt, and the adjudication was based at least in part upon the written admission of the defendant of its inability to pay debts, coupled with a willingness that it be adjudged a bankrupt. It is true the defendant signed this admission in his official capacity as president of the corporation, while he is only liable as indorser as an individual; but as an individual he knew when the notes fell due that the corporation could not pay them, because it had then been adjudicated a bankrupt and all of its property was in the hands of a receiver in the bankruptcy proceedings, in which he participated. Under such circumstances the defendant must be deemed to have waived, at least impliedly, within the meaning of the sections of the Negotiable Instruments Law above referrd to, presentment of the notes and notice of dishonor. By his consent and with his co-operation it had been rendered impossible for the maker to pay — all of its property being then in custodia legis. This view is also sustained by what this court decided in Moore v. Alexander, 63 App. Div. 100, 71 N. Y. Supp. 420. There Mr. Justice Ingraham, in considering the liability of an indorser where no presentation had been made, said:

"' . . . It is only when, because of some act of the indorser, the non-payment by the maker and a failure of notice to the indorser cannot possibly operate to the injury of the latter, that the omission is excused. The mere fact of insolvency of the maker is not enough. . . . The fact which would excuse this presentation must, as I understand it, be some act in which the indorser participated, by reason of which the knowledge of the fact that the maker would not pay the bill could be of no benefit to him.'

"When the notes in question fell due the maker could not pay. The indorser knew it, because he had participated in the act which made it impossible for it to pay; and for that reason a failure to present the notes for payment and give him notice of non-payment could not by any possibility have injured him."

See Decision No. 1129.

Bills and Notes: Corporations: Non-negotiable Instrument: Irregular Indorsement.

The defendant is an irregular indorser of the illustrated promissory note and contested its liability to the payee named therein on several grounds, one of which was that the note was non-negotiable and therefore the indorsement of the company was not in any sense a guaranty. The court held otherwise on this point. The facts briefly are these: The Goldy Machine Company needed money and did not wish to have it appear upon their books that they were making a loan, although they desired $10,000. This note was made by William T. Garrett,

Digitized by Google

$15.000.00

San Francisco, Cal., March 24, 1905

On demand, for value received, I promise to pay B. B. Tilden, the sum of fifteen thousand dollars ($15.000.00) with interest at the rate of three per cent (3%) per annum.

Witness: H. H. Benedict William T. Garrett

Digitized by Google

The Goldy Machine Co
per S. N. Goldy

H. F. Emme
Executive Committee

This note is illustrated for the reason that it is a good illustration of a defect which very frequently causes an instrument to be non-negotiable. One of the elements of negotiability is that a negotiable instrument must be payable to order or to bearer. It will be noticed that this instrument reads: "I promise to pay B. B. Tilden." The instrument is not payable to the order of B. B. Tilden. If it read pay B. B. Tilden or order, pay B. B. Tilden or bearer, or pay to the order of B. B. Tilden, it would be a negotiable instrument. As it is, it is a contract, but not a negotiable instrument. It cannot be negotiated.

The non-negotiability of this note was not controverted, but the defendant, the Goldy Machine Company, the above indorser, contested its liability, when sued by the payee B. B. Tilden, on the ground that it was not liable as an irregular indorser upon a non-negotiable note. The court held that one, who writes his name upon the back of a non-negotiable note to give credit to the maker, is a guarantor and liable, if the maker does not pay the note. The Goldy Machine Company needed money, and by an arrangement with William T. Garrett, Garrett executed this note to B. B. Tilden, who paid the amount of the note, $15,000, to Garrett. The arrangement between the Goldy Machine Company and Garrett also provided that Garrett was to sell the stock of the Goldy Machine Company, and he was to purchase with $10,000 of the money realized from this note $15,000 worth of the stock of the company, retaining the other $5,000 realized from the note as his commission. The company had the right to indorse this note, as it did, under its charter and by-laws, and also by reason of a resolution of the board of directors. There is, therefore, no question of the corporation's authority to become an irregular indorser or of the above-named executive committee's authority to indorse the note in the name of the company. The court held that the company having received the money was estopped from repudiating its liability on the note.

Digitized by Google

an agent of the company, the company becoming an indorser, although the money was originally paid to Garrett directly by Tilden. Garrett and the company had an agreement by which he was to sell the stock of the company, and with the money realized from this note he was to pay the company $10,000 and take $15,000 worth of the stock, receiving the other $5,000 as his commission. The court also held that the company having received the money on the note, it was not in a position to deny its liability, and that the indorsement of the company was authorized by the provisions of the charter and by-laws, and by resolution of the board of directors designating S. N. Goldy and H. F. Emme as an executive committee to execute the note. One of the important things to learn from this case is that the note is not a negotiable instrument for the reason that it is not payable to the order of some one. One of the elements of negotiability is that an instrument must be payable to order or to bearer, and any instrument which is not so payable is not a negotiable instrument. However, the irregular indorsement of a non-negotiable instrument makes the irregular indorser a guarantor for the party, for whose benefit he indorsed the note.

The court said in part:

"A preliminary point is made, to wit, that, as the note is not negotiable 'the mere indorsement of the name of the company on the back thereof was not in any sense a guaranty that the company would pay the same.' The Supreme Court has decided otherwise. First National Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94, where it was said: 'One who writes his name upon the back of a non-negotiable promissory note to give it credit is a guarantor, and is liable prima facie for the payment of the note upon default of the principal, without any previous demand or notice.'

"By subdivision 1, section 22, of the company's by-laws, certain powers were conferred upon the board of directors: '(1) To delegate any of the powers of the board in the course of the current business of the company to any standing or special committee, or to any officer or agent, and to appoint any persons to be the agents of the company, with such powers (including the power to sub-delegate) and upon such terms as they think fit.' It thus appears that the directors were authorized to delegate 'any of the powers of the board in the course of the current business of the company.' Article 5 of the charter of the company is as follows: 'The board of directors are expressly authorized by a resolution passed by a majority vote of the whole board, under suitable provision of the by-laws, to designate two or more of the number to constitute an executive committee, which committee shall for the time being, as provided in said resolution, or in the by-laws, have and exercise all the powers of the board of directors which may be lawfully delegated in the management of the business and affairs of the company, and shall have power to authorize the seal of the company to be affixed to all papers which may require it.' Pursuant to the foregoing provisions of the charter and by-laws, the board of directors on January 16, 1905, duly passed

Digitized by Google

the following resolution: 'Resolved, That Messrs. S. N. Goldy and H. F. Emme be and hereby are designated as members of the executive committee with authority to exercise all the powers of the board in the current business of the company while the board is not in session.' Acting under its appointment, the executive committee on March 24, 1905, passed the following resolution, as appears from its minutes: 'Whereas, in order for the said William T. Garrett to secure the said sum of ten thousand dollars for investment in this company it is necessary for him to draw a note for fifteen thousand dollars in favor of B. B. Tilden, the same to be indorsed by the Goldy Machine Company: Therefore, be it resolved, that considering the necessity of securing this investment the executive committee indorses said note in the name of the company. Upon motion the meeting adjourned. (Signed) S. N. Goldy, H. F. Emme, Executive Committee.' The execution of the guaranty indorsement by the executive committee is fully proved, and also that the company received the money paid by Tiden. We do not entertain any doubt but that the authority to indorse the note was coneferred upon the executive committee. It seems to us that it was entered into in the course of the current business, and in reality it was the obligation of the company as fully appears from the evidence and not Garrett's, who was but an accommodation maker. Besides, if this be not so, still, under the circumstances attending the transaction, showing among other things that the company received the money and knowingly used it in its business, it is not in a position now to question the authority under which it obtained the money. It is estopped to set up such defense. 10 Cyc. 1067, 1068; Lakestreet Electrical Railroad Company v. Carmichael, 184 Ill. 348, 56 N. E. 373; Main v. Casserly, 67 Cal. 127, 7 Pac. 426; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527."

See Decision No. 1130.

Bills and Notes: Consideration: Extension of Time of Payment of Another's Debt, Good Consideration.

The plaintiffs, Zimbleman & Otis, sued Finnegan upon his promissory note for $749.12. Finnegan admitted the execution of the note, but his defense was that he did not deliver it, intending it to be a binding obligation, that other signatures were to be obtained in addition to his own, and he also pleaded lack of consideration. The facts developed at the trial were that a driving association, of which Finnegan was a member, owed this money to Zimbleman & Otis for lumber furnished; that Zimbleman & Otis were about to file a mechanic's lien, and that Finnegan executed this note in consideration of the debt, which was not his own, except as a member of the driving association. Relative to the controversy as to whether other signatures were to be obtained, the court found that Finnegan endeavored to get other signatures, obtaining from Otis the note for that purpose, and the note remained with him for about four months and he

Digitized by Google

returned it to Otis, and asked Otis if he had obtained the other signatures, and Otis told him he had not, and the court further found that the note was returned to Otis as Finnegan's binding obligation.

Relative to the defense that there was a lack of consideration, the court found with the plaintiff, holding that the extension of the time of payment of a debt was a good consideration for a promissory note. The extension of the time of payment of another's debt, which is the situation in this case, also constituted a sufficient consideration. The statute of frauds, which provides that a contract to answer for the debt, default or miscarriage of another must be in writing, does not apply in this case, for the reason that a promissory note virtualy makes this contract, one in writing. The judgment in favor of the plaintiff was affirmed.

The court said in part:

" Plaintiff was not required, in the first instance, to plead any consideration for the note. That was presumed. In response to defendant's plea of no consideration, plaintiff was not bound to state the consideration. There was, as we have seen, evidence as to a consideration for the note. The most troublesome question in the case is the issue of want of consideration for the note. That an extension of time to the principal debtor is a sufficient consideration is well established. The receipt of a note as security for a debt or forbearance to sue upon a present claim or debt, or the giving of an extension of time to an imputed debtor, will be sufficient to enforc the maker's obligation. Daniel, Neg. Inst., § 183; Worner v. Waterloo Works, 50 Iowa, 262. And so, if goods be furnished by A to B at the request of C, it is a good consideration for a note to C to A. Atherton v. Marcy, 59 Iowa, 651, 13 N. W. 759. Moreover, a debt due from a third person is a good consideration for a note from a maker to the creditor, provided there was either an express or implied ageement for an extension of time. Mansfield v. Corbin, 2 Cush. (Mass.) 151. An agreement will be implied if the debt is then due, and the note is made payable at a future day. Thompson v. Gray, 63 Me. 228; Fulton v. Loughlin, 118 Ind. 288, 20 N. E. 796; Yeatman v. Mattison, 59 Ala. 382. Now, the evidence shows without any dispute that, when the lumber was delivered pursuant to a sale, which was presumtively for cash, the Driving Park Association had nothing wherewith to pay the account, and that to settle and adjust the same the note in suit was made, either as the obligation of defendant alone or to be signed by others, that this note was due on or before one year from date, thus giving defendant one year at his option to pay the same, and that thereafter the Driving Park Association was not regarded as a debtor, or, if a debtor, the time for the payment of its account was extended. Under well-known rules this constituted a sufficient consideration for the note. Defendant's counsel has much to say in this connection regarding the statute of frauds, which, as we have already indicated, is not regarded as germane. The promise here is in writing, is admitted by defendant, and is not within the statute of frauds. The only questions involved were those submitted by the trial court in

Digitized by Google

its instructions. Appellant's counsel argue, however, that there is no testimony to sustain the claim that the time for the payment of the lumber bill was extended, and they cite, and rely with great confidence upon, J. H. Queal & Co. v. Peterson, (Iowa) 116 N. W. 593. But that case is not controlling. It does not hold that an agreement to forbear may not be implied from circumstances. It is authority simply for the proposition that from forbearance alone without more an agreement to forbear will not be implied. But that there may be an implied agreement from such circumstances as are shown in this case is abundantly established by the authorities. See those heretofore cited, and Boyd v. Freize, 5 Gray (Mass.) 553. It is important, in this connection, to remember defendant's relation to the Driving Park Association, and that he in fact placed the order for the lumber, and at various times secured an extension of the time for the payment of the bill. There was enough testimony to support the verdict, and we discover no error."

See Decision No. 1131.

The following decision, which is a decision of the Court of Appeals of the State of New York, affirms a prior decision of the Appellate Division, which affirmed the decision of a trial judge of the Supreme Court of the State of New York, directing a verdict for the plaintiff. The trial judge rendered an opinion. We discussed this opinion editorially and printed an illustration of the draft involved. We beg to refer our subscribers to page 153a of the April, 1907, Quarterly and decision 954, printed in the same Quarterly. The decision of the Court of Appeals, which we print in full, contains a full statement of the facts and is an excellent treatise of the law on the subject-matter.

The Negotiable Instruments Law provides that a negotiable instrument is payable to bearer (1) when it is expressed to be so payable; or (2) when it is payable to a person named therein or bearer; or (3) when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person, or (5) when the only or last indorsement is an indorsement in blank.

In this case the defendant contended that the draft involved was payable to bearer under subdivision (3) of the above section, but the Court of Appeals emphasized, even more than the trial court judge, that the fact, that a negotiable instrument is payable to a fictitious or non-existing payee must be known to the maker or drawer of the instrument to make the instrument payable to bearer. The Court of Appeals in this decision discusses at some length this particular section of the Negotiable Instrument Law.

Digitized by Google

SEABOARD NATIONAL BANK v. BANK OF AMERICA.

(Court of Appeals of New York. October 6, 1908.)

85 N. E. 829.

BANKS AND BANKING — WRONGFUL PAYMENT OF DEPOSITS — LIABILITY OF BANK — BILLS AND NOTES — TRANSFER BY INDORSEMENT — FORGED INDORSEMENT — EFFECT — LIABILITY OF INDORSERS — NEGLIGENCE — IRREGULAR INDORSEMENT — VALIDITY — "FICTITIOUS OR NON-EXISTING PERSON."

1. The relation between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor.

2. Under Negotiable Instruments Law (Laws 1897, p. 727, c. 612, § 42), providing that where a signature is forged, it is inoperative, and no right to retain the instrument or to enforce payment thereof can be acquired, a bank which has collected a draft from the drawee, upon which the payee's indorsement is forged, cannot retain the money, as it had no title to the draft.

3. In an action by the drawee of a draft, upon which the payee's indorsement was forged, against the bank which had collected the draft from drawee, alleged negligence on the part of the bank which drew the draft, in not discovering that the check for which the draft was exchanged was a forgery, is immaterial, where no act of the bank in which the draft was deposited, or of the bank which collected it, was induced by the acts, representations, or admissions of the bank which drew the draft.

4. Actual ownership of commercial paper and use thereof by the owner are essential to sustain irregular indorsements before delivery to the payee.

5. A draft drawn by a bank, payable to an existing partnership, on the fraudulent request of a depositor's bookkeeper, who thereafter indorsed the partnership's signature, and deposited the draft in his own account, was not payable to a fictitious or non-existing person, so as to pass by delivery, within Negotiable Instruments Law (Laws 1897, p. 724, c. 612, § 28), as it is only where a person making an instrument knows that he is making it payable to a fictitious or non-existing person that it can be treated as payable to bearer.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Seaboard National Bank against the Bank of America. From a judgment of the Appellate Division (118 App. Div. 907, 103 N. Y. Supp. 1141), affirming a judgment for plaintiff at the Trial Term (51 Misc. Rep. 103, 100 N. Y. Supp. 740), and an order denying a new trial, defendant appeals. Affirmed.

Three persons doing business under the firm name of E. V. Babcock & Co., at Pittsburg, Pa., were depositors in the Federal National Bank of that City. One Pennock was the auditor and chief bookkeeper, and known by said bank to be in the employ of said firm. On September 17, 1904, said Pennock went to said bank, and presented a check purporting to be signed by said firm, drawn upon said bank, payable to the order of "N. Y. Draft," for $2,000, and requested said bank to give him a New York draft for $2,000, payable to the order of "Carroll Bros." A draft was drawn by said bank upon the plaintiff, a banking institution in the city of New York, and delivered to said Pennock. Said Pennock thereupon went to the Mellon National Bank of Pittsburg, Pa., in which bank he had a personal account, and he

Digitized by Google

thereupon signed the name of "Carroll Bros." on the back of said draft, and deposited the same to his account in said Mellon National Bank. The draft was indorsed by the Mellon National Bank, and forwarded to its correspondent, the defendant, in the city of New York. The defendant collected said draft of the plaintiff, through the clearing house in the city of New York in the usual course of business. The check upon the Federal National Bank, which purported to be signed by E. V. Babcock & Co., was a forgery. "Carroll Bros." is a partnership, composed of two members, doing business in Pennsylvania, and it had dealings, from time to time, with said E. V. Babcock & Co., but in the dealings with said E. V. Babcock & Co., Carroll Bros. were always indebted to E. V. Babcock & Co. The indorsement of the name "Carroll Bros." upon said draft was without the knowledge or authority of said Carroll Bros., said E. V. Babcock & Co., or of said Federal National Bank. Subsequently E. V. Babcock & Co. acquired knowledge of the transactions relating to said check and draft, and they presented proof of the facts to the Federal National Bank, and the amount of the check, which had theretofore been charged to the account of E. V. Babcock & Co., was recredited to it. The Mellon National Bank refused to make restitution to the Federal National Bank. The Federal National Bank had at all times mentioned an active account with the plaintiff, and the plaintiff charged the amount of said draft so paid by it to the Federal National Bank, and returned the draft as a voucher to it. When the Mellon National Bank refused to make restitution to the Federal National Bank, it forwarded the draft to the plaintiff, and the plaintiff restored to the Federal National Bank the amount ti had charged to it by reason of said draft, and thereupon tendered the draft to the defendant, and demanded restitution of the amount paid by the plaintiff to the defendant on said draft, which demand was refused. Said draft was made, executed, and delivered by said Federal National Bank upon the request of said Pennock, who purported to represent E. V. Babcock & Co., and said Federal National Bank handed said draft to said Pennock accordingly. Prior to the time when the Federal National Bank ascertained the true facts about said check and draft, the amount of the draft credited by the Mellon National Bank to said Pennock was withdrawn from the bank, and said Pennock had died insolvent. This action was brought to recover the amount of said draft, and judgment was entered in favor of the plaintiff, from which judgment an appeal was taken to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed, and from such judgment of affirmance an appeal is taken to this court.

Charles E. Rushmore, for appellant. Herman Aaron, for respondent.

CHASE, J. (after stating the facts as above). The Federal National Bank was a depositor with the plaintiff. The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's acount only upon the actual direction of the depositor. Critten v. Chemical National Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. It is provided by the Negotiable Instruments Law that: "Where a signature is forged or made without authority of the person whose signature it purports to be,

Digitized by Google

it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." Laws 1897, p. 727, c. 612, § 42. If it was necessary for Carroll Bros. to indorse the draft before it could be paid by the plaintiff to the account of the Federal National Bank, then it was never so indorsed, because Pennock's act was a forgery, and wholly inoperative. The defendant cannot retain the money paid to it by the plaintiff upon such unindorsed draft, for the very excellent reason that it had no title to the instrument upon which the money was paid. It is further provided by the Negotiable Instruments Law (Section 28) as follows: "The instrument is payable to bearer: (1) When it is expressed to be so payable; or (2) when it is payable to a person named therein or bearer; or (3) when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank."

It is claimed by the defendant that the draft was payable to a fictitious or non-existing person, and consequently writing the signature of Carroll Bros. on the back of the draft was not in legal effect a forgery, and not necessary to protect the plaintiff in its payment. The defendant also claims that the Federal National Bank was negligent in not discovering that the check of E. V. Babcock & Co. presented to it by Pennock was forged, and that such negligence should prevent the plaintiff from recovering against the defendant in this action. The draft was obtained from the Federal National Bank by fraud. It was a fraud perpetrated by the same person, who, within a short time after perpetrating it, fraudulently obtained the money upon the draft from the Mellon National Bank, but the fraudulent acts, so far as they concerned persons other than Pennock, were wholly unrelated. The Federal National Bank was the only one concerned in the consideration accepted by it in issuing the draft. The question in this action, therefore, is not dependent in any way upon the facts relating to the consideration for the draft, or as to whether the consideration for the draft was real or fictitious, but whether, upon all the facts disclosed, the draft was legally collected from the plaintiff by one other than its payee, or as ordered by it. The transaction between the plaintiff and the defendant had no legal connection with the fraud by which Pennock obtained the draft from the Federal National Bank. We are of the opinion that the alleged negligence on the part of the Federal National Bank is immaterial in this action, because no act of the Mellon National Bank or of the defendant was induced by the acts, representations, or admissions of the Federal National Bank. We also think that the defendant is wrong in its contention that the draft was payable to bearer as defined in the Negotiable Instruments Law. It is only when a person making an instrument knows that he is making it payable to a fictitious or non-existing person that it can be treated as payable to bearer.

The appellant asserts that a person to whom a draft, made payable to a third person, is issued can, while he remains the owner thereof,

Digitized by Google

divert it from the purpose for which it was intended, and that, for the purpose of such diversion, or of returning the amount of the draft to his account in the bank, he can indorse the payee's name thereon without being liable for the crime of forgery. Assuming that, in cases where the draft has never been delivered to the payee, or the payee has not in some way obtained a vested interest therein, the appellant is right in its claim, the assumed authority to so indorse the payee's name thereon does not arise because the draft is payable in legal effect to bearer, but because of the fact that such an act of the owner is harmless. Such means of recalling a proposed transaction, or of changing the use to be made of a draft, is sustained upon the right that a person has to do as he pleases with his own, and for that reason, until the rights of others in the draft have become vested, the acts of the owner therewith are innocent and colorless. An irregular form of indorsement of commercial paper is frequently observed and approved, when such paper is indorsed only for deposit to the credit of the payee. Actual ownership of commercial paper and use thereof by the owner are essential to sustain irregular indorsements. The bank in issuing the draft in question dealt with Pennock, but with Pennock as the representative of E. V. Babcock & Co., and not with him individually. Pennock did not purport to act individually, or to exercise individual intention. The draft issued was the obligation of the Federal National Bank. It was payable to a real partnership. The conceded transaction, so far as it was expressed in acts or words, including the delivery of the check charging the amount thereof to E. V. Babcock & Co., and the receipt of the draft in return for the check, was not with Pennock individually, and he did not become the owner of the draft with any rights therein as owner. The secret intention of a criminal, contrary to his express intention, and the avowed purpose for which he obtains possession of a draft, does not give the criminal ownership of the draft, or a legal right to change a draft, payable to a real payee, to one payable to bearer. There is no presumption arising from the facts proven that the name "Carroll Bros." was intended as a fictitious or non-existing payee. Such intention, to be effective, must necessarily arise from knowledge and exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery. There is nothing in this case to estop the plaintiff from controverting the genuineness of the indorsement of the draft in controversy as in Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310, where one of the members of a partnership, the makers of a draft, put it into circulation, with the forged indorsement of the payee upon it, or as in Phillips v Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, where the person who forged the name of the payee was the cashier of the defendant, empowered to bind the bank by his checks. The legal effect of making a note or bill payable to a fictitious person was stated in Rev. Stat. pt. 2, c. 4, tit. 2, § 5, as follows: "Such notes, made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer."

Prior to the enactment of the Negotiable Instruments Law, the language of which makes it clear that, if an instrument is to be deemed

Digitized by Google

payable to bearer, although in form payable to a named person, the intention to make the instrument payable to a fictitious or non-existing person must exist with the maker thereof, this court, in Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, referring to the rule stated in the Revised Statutes, said: "We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." The court further say: "Bedell (the employee who signed the names of the payees) of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals."

Selover in his work on Negotiable Instruments Law (page 70) says: "The doctrine that a check or bill made payable to a fictitious person is payable to bearer, and negotiable without indorsement if the fictitious character of the payee was known to the parties, originated in England, and in each of the cases holding the doctrine the decision was based on the fact that the acceptor knew, at the time of his acceptance, that the instrument was payable to a fictitious person. If the drawer or maker of an instrument did not know that the payee was a fictitious or non-existing person, and did not intend to make the paper payable to such person, paper payable to the order of such person cannot be treated as payable to bearer, for the intention of the maker or drawer is the test."

Bunker on Negotiable Instruments, in his note to a section of the Negotiable Instruments Law of Michigan (section 11), corresponding to and the same as section 28 of the Negotiable Instruments Law in this State, compares the Bills of Exchange Act of England (section 7) with the statute of Michigan, and says: "The difference between the two statutes is important. The element of knowledge is the distinguishing feature. Under the English statute the paper is payable to bearer if the payee be a fictitious or non-existing person. Under the American statute paper payable to a fictitious or non-existing person is not payable to bearer unless the maker or drawer knew that the payee was a fictitious or non-existing person. Under the English statute the fact governs; under the American statute the fact coupled with knowledge governs. Thus there has been carried into the two statutes the differences heretofore existing in the authorities."

In Crawford's Annotated Negotiable Instruments Law it is said in a note to section 28, referring to the case of Shipman v. Bank of the State of New York, supra, and quoting from the opinion: "Hence if the maker or drawer supposes the payee to be an actually existing person (as for instance, wher he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist), the instrument will not be payable to bearer, and no person can acquire the title thereto by delivery. And where the instrument is drawn payable at a bank, the bank cannot charge the same to the

Digitized by Google

account of its customer, since the instrument is not in such case payable to bearer, and the indorsement is a forgery."

In Eaton and Gilbert on Commercial Paper it is said: "Under the common law a bill payable to a fictitious person or his order was neither in effect payable to the order of the drawer nor to the bearer, unless it was shown that the circumstance of the payee being a fictitious person was known to the acceptor. To show that the acceptor was aware that the payee was a fictitious person, evidence is admissible of the circumstances under which he accepted other bills payable to fictitious persons. The factitiousness of the maker's direction to pay does not depend upon identification of the name of the payee with some existing person, but upon the intention underlying the act of the maker in inserting the name. The rule as to an instrument payable to the order of a fictitious or non-existing person applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to the fictitious person."

Daniel on Negotiable Instruments, in a note to a section (section 139), in which he says that lack of knowledge of the maker of the fictitious character of the payee is not a defense against a bona fide holder, refers to a different rule in this State, and, after calling attention to our Revised Statutes, says: "The Court of Appeals, construing this statute, held that such paper cannot be treated as payable to bearer unless it was put in circulation by the maker with knowledge that the name of the payee does not represent a real person." And, further, in a note to the same section, he says: "But in New York by statute the maker is not bound to an indorsee even, unless he, the maker, knew of the fiction at the time of signing." It does not appear that the Federal National Bank knew Carroll Bros. was a fictitious or non-existing person, or intended that the instrument should be payable to bearer.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Judgment affirmed.

HAMITER v BROWN.

(Supreme Court of Arkansas. November 16, 1908.)

113 S. W. 1014.

APPEAL AND ERROR — REVIEW — QUESTIONS OF FACT — BILLS AND NOTES — BONA FIDE PURCHASERS — PRE-EXISTING DEBT — "DUE COURSE OF BUSINESS" — "HOLDER FOR VALUE" — DEFENSES — ACCOMMODATION PAPER — HARMLESS ERROR — INSTRUCTIONS.

1. The Supreme Court will not interfere with a finding by the jury on conflicting testimony.

2. One who takes negotiable paper in payment of an antecedent debt before

Digitized by Google

maturity and without notice, actual or otherwise, of any defect, receives it "in due course of business," and becomes, within the meaning of commercial law, "a holder for value."

3. A bona fide holder for value of accommodation paper taken in due course of business may enforce it against the makers although he knew when he received it that one of them was an accommodation surety.

4. A party cannot complain of instructions which are too favorable to him.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Leslie T. Brown against J. H. Hamiter. From a judgment for plaintiff, defendant appeals. Affirmed.

Dan W. Jones, for appellant. E. M. Merriman, for appellee.

McCULLOCH, J. This is an action instituted by appellee on three negotiable promissory notes executed to him by appellant as one of the joint makers with W. T. Tucker and T. H. Davis. Appellant and Davis signed the notes as joint makers, but were in fact only accommodation sureties for Tucker, which fact was known to appellee when he accepted the notes. Tucker was indebted to appellee for a sum of money collected as attorney for the latter, and appellee testified that the notes were delivered to him in satisfaction of the debt. Tucker admitted that he was indebted to appellee for money collected as the latter's attorney, but denied that the notes were delivered in satisfaction of this debt. He testified that he delivered the notes to appellee for the latter to use as collateral in borrowing money, and that he represented to appellant, when he requested him to sign as surety, that the notes were to be used only for ihat purpose. Appellant also testified that he signed the notes upon said representations made to him by Tucker that the same were for appellee's use as collateral in borrowing money. Appellee did not negotiate the notes, but kept them until maturity, and afterwards instituted this action on them.

There is no dispute in the evidence as to these representations being made by Tucker to appellant to induce him to sign the notes, and, as the verdict of the jury has settled in appellee's favor the conflict between his testimony and Tucker's as to the purpose for which the notes were delivered, we must treat it as settled that the notes were put into circulation by Tucker for a purpose not in accordance with his representations to appellant when he obtained the latter's signature. Appellant, then, has made out a defense, except as against a bona fide holder of the notes for value. Can appellee, who accepted the notes in payment of an antecedent indebtedness from Tucker, the principal, claim as an innocent holder for value? This court has answered that question in the affirmative. Tabor v. Merchants' National Bank, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241. In that case the court held that "one who takes negotiable paper in payment of an antecedent debt before maturity and without notice, actual or otherwise, of any defect thereto, receives it in due course of business, and becomes, within the meaning of commercial law, a holder for value." The fact that appellee knew when he received the notes that appellant was an accommodation surety does not affect his right to recover. Evans v. Speer Hardware Co., 65 Ark. 204, 45 S. W. 370, 67

Digitized by Google

Am. St. Rep. 919. The instructions given by the court at the instance of appellant were more favorable to him than he was entitled to, but of this he cannot complain.

The evidence justified the verdict of the jury, and the judgment is affirmed.

MILMO NATIONAL BANK v. COBBS.

(Court of Civil Appeals of Texas. December 16, 1908. Rehearing Denied January 20, 1909.)

115 S. W. 345.

BILLS AND NOTES — PROMISE TO ACCEPT — BILL OF EXCHANGE — NATURE OF PROMISE — PRESENTMENT — WHO MAY PRESENT — UNAUTHORIZED PRESENTMENT — ADMISSION OF FUNDS — ESTOPPEL — EQUITABLE ESTOPPEL — NATURE AND ELEMENTS — ACCEPTED DRAFT — DELAY IN PRESENTATION — ACTIONS — PARTIES — JOINDER OF DEFENDANTS — VENUE — RESIDENCE OF PARTIES — PRIVILEGE OF CO-DEFENDANT — TRUSTS — ACTION TO RECOVER PROPERTY — NECESSARY PARTIES — ACTION BY OR AGAINST TRUSTEES — SALE OR EXCHANGE — RIGHTS OF PURCHASER — BANKS AND BANKING — DRAFTS — ACCEPTANCE AND CERTIFICATION — LIABILITY OF DRAWER — LIABILITY FOR NON-PAYMENT OF DRAFT — ACTION AGAINST DRAWER AND ACCEPTOR OF DRAFT — NECESSITY OF DIRECTLY PLEADING — PROMISE TO PAY — APPEAL AND ERROR — RECORD — BILL OF EXCEPTIONS — EXCLUSION OF TESTIMONY — EVIDENCE — HEARSAY — TESTIMONY INVOLVING CONCLUSIONS — ACCEPTANCE OF DRAFT — LETTER AS EVIDENCE — WITNESSES — IMPEACHMENT — ADMISSIBILITY OF EVIDENCE — ADMISSION BY CASHIER — ACTION ON ACCEPTED DRAFT — TELEGRAM AS EVIDENCE — RELEASE FROM ACCEPTANCE.

1. Unless the holder of a bill of exchange took it on the strength of a promise of the drawee to the drawer to accept it, the promise does not amount to an acceptance.

2. The rule that, unless the holder of a bill of exchange took it on the strength of the promise of the drawee to the drawer to accept it, it is not an acceptance, applies to acceptances not written on the face of the paper.

3. A draft was presented to the drawee with the request that the amount thereof be placed to the credit of the payee and for a certificate showing that the money would be paid to him. Attention being called to the fact that the payee had not indorsed it, it was suggested that the paper be taken to him for that purpose, and the cashier of the drawee wrote an indorsement on the draft that it would be credited on its return, properly indorsed, and took back the certificate. After leaving the bank, the party presenting the draft found that it had been stamped paid. He returned to ask about it, and was told by the assistant cashier that no change was desired, that it was all right, as it had already been credited to the payee. Held, that there was an acceptance of the draft both verbally and in writing.

4. A draft may be presented for acceptance by the authorized agent of the rightful holder.

5. Though a draft be not presented for acceptance by the lawfully authorized agent of the rightful holder, the presentment inures to his benefit.

6. A verbal acceptance of a bill of exchange is sufficient to bind the acceptor.

Digitized by Google

7. An acceptance being an admission by the acceptor that he has funds of the drawer with which to pay the amount of the bill, the acceptor becomes the principal debtor, primarily liable for payment according to its terms.

8. As between the holder of a bill and the acceptor, the latter is estopped to deny that he has funds of the drawer with which to pay.

9. A party is estopped from escaping liability where he causes another to lose some right or vantage ground by his acts, words, or conduct.

10. Delay in the presentation of an accepted draft does not affect the liability of the acceptor because the debt in such case remains in force until barred by limitations.

11. Under the express provisions of Rev. Stat. 1895, art. 1203, the acceptor of a bill of exchange may be joined as a defendant with any one else liable thereon.

12. A proper party defendant is not entitled to the privilege of being sued in the county of his residence wherein other defendants do not reside.

13. In suits by or against a trustee to recover trust property, the beneficiary or cestui que trust is a necessary party.

14. In a suit by a trustee against a bank and a receiver of another bank to recover on account of failure to pay a draft claimed to have been purchased by the trustee from the insolvent bank against the other, the beneficiaries of the trustee are necessary parties.

15. One who buys a draft from a bank drawn by it in favor of a third person is the owner thereof, entitled to return it to the drawer and demand repayment of his money.

16. Where the purchaser of a draft made payable to another presents it to the drawee and obtains a promise to pay it in writing indorsed thereon, in case the paper is indorsed by the payee, it is an acceptance which does not release the drawer, and not a certification which does.

17. The drawer and acceptor of a draft are jointly liable to the holder in case of non-payment.

18. A suit on the joint liability of drawer and acceptor of a draft in case of non-payment can be maintained in the domicile of either.

19. Where the petition in an action by the holder against the acceptor of a draft in case of non-payment fully states the fact showing defendant's liability, a direct allegation of a promise to pay is unnecessary.

20. An assignment of error as to the exclusion of testimony of a witness cannot be considered where the bill of exceptions on which it is founded does not disclose what the witness would have testified to.

21. In an action by the holder of a draft against the drawee, it was error to permit plaintiff to testify to statements made to him by a third person; such statements being hearsay and not binding on defendant.

22. It is error to permit a party to testify to statements of a third person involving a conclusion of the latter as well as of the witness.

23. A letter written by a bank the day after a draft was presented by an agent of the holder, acknowledging notice of the draft and stating that it would be paid on presentation, is admissible, not as showing acceptance, but as corroborative of the agent's statements in relation thereto.

24. In an action against the drawee for the non-payment of a draft, a statement of an agent of the holder, who presented the draft, which statement was indorsed by defendant's cashier, except in one particular, was admissible to impeach the cashier's evidence.

25. It was also admissible as an admission on the part of defendant.

26. In an action against a bank for the non-payment of an accepted draft, a telegram of a bank examiner to defendant after the failure of drawer, as well as the reply thereto, could not affect defendant's liability, and was properly excluded.

Digitized by Google

27. Knowledge of the holder of a draft as to there being no funds of the drawer with the drawee to meet it could not relieve the drawer of the effect of its acceptance, except perhaps in the case of a conspiracy to defraud the drawee.

Appeal from District Court, Bexar County; Edward Dwyer, Judge.

Suit by T. D. Cobbs, trustee, against the Milmo National Bank and another. From a judgment for plaintiff, the defendant bank appeals. Reversed.

Atlee & Atlee, for appellant. Cobbs & Cobbs, Don A. Bliss, and John H. Cunningham, for appellee.

FLY, J. This is a suit instituted by T. D. Cobbs, trustee, against appellant and H. N. Morris, receiver for the Woods National Bank, to recover the sum of $8,360.22 and damages alleged to be due by reason of the following facts: "That said trustee had a contract with J. R. Moore and Jacobo C. Guerra for the purchase of 5,000 acres of land in Starr county, and Monroe and Guerra had a contract to purchase the same land from one Jesus Maria Yzaguirre, and it was agreed between the trustee and the two parties named that the trustee should pay the purchase price of the land to Yzaguirre through the Milmo National Bank, in Laredo, Texas. That on October 24, 1907, the trustee purchased from Woods National Bank in San Antonio, Texas, a bill of exchange for the sum of $8,360.22 drawn on appellant and payable to the order of Yzaguirre, which bill of exchange was given by the trustee to one John Thaison with instructions to place it to the account of the said Yzaguirre in appellant's bank and to procure from it a certificate that the amount would be paid to Yzaguirre, and that said Thaison presented the bill of exchange to appellant, and requested that the amount of the same be placed to the credit of Yzaguirre, and asked for and received a certificate showing that the money would be paid to him. It was further alleged: That at the same time attention was called to the fact that Yzaguirre had not indorsed the bill of exchange, and Thaison suggested that he would take the paper to Yzaguirre and have it indorsed, and then the cashier wrote on it, "On return properly indorsed will be credited to the account of Jesus Ma. Yzaguirre 10-25-07," and took back the certificate of deposit, and gave the bill of exchange to Thaison, who, after leaving the bank, found that it had been stamped paid. He returned to the bank and asked about it, and was told by Mussett, the assistant cashier, that no change was desired, that it was all right, as the bill of exchange had already been credited to Yzaguirre. That said Thaison then proceeded with the bill of exchange to Rio Grande City, near the city of Camargo, Mexico, where Yzaguirre resided, but, being absent from his home, Thaison did not see him, and before he returned Woods National Bank had suspended and been placed in the hands of a receiver, and appellant notified Yzaguirre that it would not pay the bill of exchange, and Yzaguirre then refused to convey the lands to the trustee. That several days after the bill of exchange was issued the trustee was informed by Woods National Bank that the bill of exchange would be paid by the Milmo National Bank. It was alleged that, when the bill of exchange was presented by Yzaguirre to appellant, it indorsed on the back of the paper: "Woods National

Digitized by Google

Bank having failed, payment is refused by order of the bank examiner in charge." That, when the bill of exchange was issued by Woods National Bank, it notified appellant, and in reply appellant wrote: "We have your favor of the 24th and note that you have drawn on us for $8,360.22 in favor of Jesus Ma. Yzaguirre. We shall take pleasure in paying draft on its presentation." Woods national Bank on January 7, 1908, answered by general demurrer and general denial, and on same date appellant filed its plea of privilege to be sued in Webb county, which was verified by the affidavit of its cashier, M. T. Cogley. On February 17, 1908, pleas in abatement were filed by appellant, on the grounds that no privity of contract was shown between the two banks, that the trustee did not disclose for whom he was trustee, and that W. F. Woods and Don A. Bliss were proper parties and should be joined in the suit. On same day appellant filed its defenses without waiving its pleas of privilege and pleas in abatement. In that answer were special exceptions to the petition on the following grounds:

"(1) Because no consideration is alleged whereby this defendant was bound to honor and pay the bill of exchange mentioned in said petition, and it is not alleged that the Milmo National Bank had funds of the Woods National Bank against which the same was drawn.

"(2) Because the alleged act of certification of said bill of exchange was not binding on the Milmo National Bank, but is ultra vires, null and void, it not being also alleged that the Woods National Bank had on deposit with the Milmo National Bank, at the time of such alleged certification, an amount of money equal to the amount of money specified in said bill of exchange, and it does not appear that such alleged act of certification proceeded upon and was for any consideration, and because it appears that such alleged act of certification was revoked before the said bill of exchange was delivered to the payee named therein, and because it does not appear that the said payee, upon delivery of said bill of exchange to him, became a bona fide holder thereof without notice, but the contrary appears in the allegations of the petition

"(3) Because the allegations on page 4, beginning, 'Immediately after the said Woods,' and ending on page 5, with, 'Would not be paid,' are insufficient to show any promise made to plaintiff to pay said bill of exchange, or any act of this defendant from which the cause of action sued on arose, and it is not alleged that the alleged letter of this defendant was exhibited to plaintiff nor when.

"(4) Because it is not made to appear how this defendant has become bound to pay to plaintiff the full amount of said bill of exchange or any amount, nor how the plaintiff has the right to recover of the defendant the said sum of money or any sum of money under the laws of the United States, as alleged on page 5 of plaintiff's petition, beginning, 'Your petitioner further shows,' down to and including 'United States,' it not being alleged that the Woods National Bank had funds on deposit with this defendant at the time such alleged cause of action arose or at any time, and it further appearing that, if any liability arose by reason of the alleged act of certification, such liability was to the payee named in the instrument certified, and not to the plaintiff

"(5) Because the petition does not show what money, if any, or

Digitized by Google

what consideration, if any, was paid by plaintiff on the purchase of said bill of exchange, nor does it show when nor how the money was placed in the Woods National Bank, as alleged, nor how much money was so placed

"(6) Because it is not made to appear how the refusal of this defendant to pay said bill of exchange caused the petitioner to lose the purchase and conveyance of lands, as alleged on page 6 of the petition; it not being alleged that this defendant made any promise to plaintiff that it would pay said bill of exchange."

Exceptions to the pleas of privilege and the pleas in abatement were sustained and the special exceptions of appellant were overruled by the court, and, no jury being demanded, the court heard the facts and rendered judgment for the trustee in the sum of $8,360.22 against the receiver and appellant.

There is some diversity of opinion between the courts of the United States and England as to the effect of a written promise to the drawer to accept an existing bill of exchange which was not communicated to the holder or purchaser of the same, and which, therefore, could not have formed any inducement for the purchase of the bill. In most American cases the liability of the acceptor, in case of a written acceptance, is measured by the acceptance having been an inducement to the taking of the bill. In the English cases it is held to be immaterial. The view generally accepted in the United States, however, is that, unless the holder took the bill on account of the promise, it is not an acceptance. Coolidge v. Payson, 2 Wheat. 62, 4 L. Ed. 185; Schimmelpennich v. Bayard, 26 U. S. 264, 7 L. Ed. 138; Boyce v. Edwards, 29 U. S. 111, 7 L. Ed. 799; Bank v. Rice, 98 Mass. 288, 107 Mass. 37, 9 Am. Rep. 1. The rule sustained by the cases cited we believe to be the reasonable and proper one, and we conclude that as the letter written by appellant to Wood National Bank did not figure as an inducement to the purchase of the bill of exchange by T. D. Cobbs, the trustee, it should not have figured in the decision of the case. The rule mentioned applies to written acceptances not written on the face of the paper, because it is the desire of the law to restrict within the narrowest limits the doctrine of liability to an action on negotiable paper by reason of anything not appearing on the face of the paper itself. After the check had been drawn, however, and delivered to the trustee, to whom it belonged, he placed it in the hands of his agent, Thaison, for presentment to appellant, and there was an acceptance of the draft both verbally and in writing hereinbefore copied. That presentment was a legal one. It was made by the lawfully authorized agent of the rightful holder, and, if he had not been, the presentment would inure to the benefit of the rightful holder, whoever he might be. Tiedeman, Comm. Paper, § 212. The verbal acceptance alone was sufficient to bind the acceptor. Newmann v. Schroeder, 71 Tex. 81, 88 S. W. 632; White v. Dienger, (Tex. Civ. App.) 25 S. W. 666. The acceptance had the effect of an admission upon the part of the appellant that it had funds of the drawer with which to pay the amount of the bill, and the acceptor became the principal debtor and primarily liable for payment of the bill of exchange according to the terms of the contract therein evidenced. Stark v. Alford, 49 Tex. 260. As between the holder of the bill and the acceptor, the latter is estopped from denying that he has funds

Digitized by Google

of the drawer with which to pay the bill. As said by the Supreme Court of the United States in Raborg v. Peyton, 2 Wheat. 385, 4 L. Ed. 268: "An acceptance is not a collateral engagement to pay the debt of another. It is an absolute engagement to pay the money to the holder of the bill, and the engagements of all other parties are merely collateral. Prima facie every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and is of itself an express appropriation of those funds for the use of the holder. The case may, indeed, be otherwise; and then the acceptor, in fact, pays the debt of the drawer, but as between himself and the payee it is not a collateral, but an original and direct undertaking."

In the case of Hortsman v. Henshaw, 11 How. 177, 13 L. Ed. 653, Chief Justice Taney said: "Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer. And, if he accepts without funds, upon the credit of the drawer, he must look to him for indemnity, and cannot on that ground defend himself against a bona fide indorsee. The insolvency of the drawer can make no difference in the rights and liabilities of the parties." The enunciated rule is founded on that principle of right and justice which estops a party from escaping liability where he has caused another to lose some right or vantage ground by his acts, words, or conduct. Had appellant informed the agent of the trustee that it had no funds belonging to Woods National Bank and could not pay the draft to Yzaguirre, he could at the time most probably have saved himself from loss by demanding payment of the drawer, or at least it would have given him a chance to protect himself from loss. On the other hand, appellant promised to pay the draft and lulled the trustee into security until the failure of the drawer on November 6, 1907. As said by a text-writer: "Any language, . . . whether verbal or written, employed by an officer of a banking institution whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good and will be paid, estops the bank thereafter as against a bona fide holder of the check from denying the want of funds to pay the same." Bigelow, Estoppel, p. 504. What the cashier and his assistant told Thaison and the indorsement on the check were equivalent to an acceptance of the check. It was a representation that the check was good, that appellant had funds of the drawer to meet it, and would pay it when Yzaguirre wrote his name on the back of it. It was an absolute engagement to pay the amount of the draft to the person for whom it was intended. The debt thereupon became that of appellant. It had satisfied the agent of the trustee that the bill was good and would be paid, and thereby prevented him from taking steps to protect himself until it was too late. Delay in the presentation could not figure in the case because the debt having become that of appellant would remain in force until barred by some statute of limitations. Bank v. Bank, 16 N. Y. 128, 69 Am. Dec. 678; Meads v. Bank, 25 N. Y. 143, 82 Am. Dec. 331; Bank v. Wetherald, 36 N. Y. 335.

It follows from the discussion of the law of the case that the petition was not subject to the general or special exceptions urged against it on the ground that it did not state a cause of action. Un-

Digitized by Google

der the allegations, it was unnecessary to allege that appellant had funds belonging to Woods National Bank. It was utterly immaterial whether it had such funds or not. It was not necessary to allege that the trustee was induced to buy the exchange from Woods National Bank, because that was not the ground of appellant's liability. It was liable for its acceptance of a check in the hands of the holder whereby he was prevented from obtaining his money from the issuing bank.

There can be no dubt that appellant was a proper party defendant to the suit on the bill of exchange. It is always proper to join the acceptor of any bill of exchange or any other principal obligor in any contract with any one else liable thereon. This rule is statutory. Rev. Stat. 1895, art. 1203. It would seem from article 1204 that the acceptor is a necessary party in a suit against the drawer unless certain conditions therein named exist. Appellant being a proper, if not necessary, party, the plea of privilege was properly overruled. Railway v. Mangum, 68 Tex. 342, 4 S. W. 617. In that case the court in construing the fourth exception to the general law that a person must be sued in the county of his residence said: "This, however, does not mean that an inhabitant of this State may be sued in a county other than his residence whenever a plaintiff without sufficient ground may join with him as a defendant some person who may be resident of the county in which the action is brought. It means simply that if one who is a proper or necessary party defendant resides in the county in which the action is brought that then other defendants may be joined with him who reside in other counties." The case of Mathonican v. Scott, 87 Tex. 396, 28 S. W. 1063, is also in point.

The ninth assignment of error brings in review the action of the court in overruling the exception to the petition on the ground that it failed to state the names of the beneficiaries who were represented by the trustee and we think the assignment should be sustained. The well-established rule is that in suits by or against the trustee for the recovery of trust property the beneficiary or cestui que trust is a necessary party. Hall v. Harris, 11 Tex. 300; Huffman v. Cartwright, 44 Tex. 296; Boles v. Linthicum, 48 Tex. 224; Ebell v. Bursinger, 70 Tex. 120, 8 S. W. 77; Cotton v. Coit, 88 Tex. 414, 31 S. W. 1061. The reason for the rule is the prevention of a multiplicity of suits and that there may be a complete and final decree between all the parties interested. Another reason might be offered in a case like this, and that is that the disclosure of the names of the beneficiaries might open up defenses for the defendant that would not otherwise be practicable or proper. A different case might be developed if the names of the beneficiaries are disclosed. Every one interested in the suit should be made a party in order that there may be a full and fair investigation as to the relations of each one to Woods National Bank, to the receiver, to the trustee, to the appellant, and to the subject-matter. In order to recover, the beneficiaries must appar to have obtained the draft for value and in good faith, for fraud will vitiate anything, and, unless it fully appears that the beneficiaries represented by the trustee, actually parted with something of value for the check, and that the purchase was not a mere bookkeeping entry (Daniel, Neg. Instr., § 779b), the beneficiaries cannot recover

Digitized by Google

any sum from appellant. Its liability is based on the proposition that the beneficiaries have been placed in a worse position by the failure to pay the check drawn by Woods National Bank. Not only did appellant except to the petition on the ground that the beneficiaries in the trust were not made parties, but by a plea, supported by affidavit, suggested the names of parties who were beneficiaries and asked that they be made parties. The court overruled exception and plea. In this case the holder of the check did not take a certification of the check as payment of the check, and thereby release the drawer, but merely presented it and received the assurance that it would be paid when properly indorsed. Nothing was received in lieu of payment of the check. The check or draft had been bought by the trustee, and, when delivered to him, was his property. He could have returned it to the drawer and have demanded repayment of his money. It was his, although drawn in favor of Yzaguirre, and at the time it was presented to appellant it was still his property, and all he obtained from appellant was a promise to pay the money if Yzaguirre would indorse it. It was a mere acceptance, and, after it was made, the trustee still had his recourse on Woods National Bank, and could have refrained from giving the check to Yzaguirre and obtaining his indorsement. Before the check ever reached Yzaguirre's hand, he had been notified that the check would not be paid, and he refused to take it and refused to convey the lands for which it was to pay. There was no certification of the check which would have released the drawer and have made appellant the principal and only debtor, but there was merely an acceptance of it which placed appellant in the position of principal debtor but did not release the drawer. The trustee at the time the check was presented to appellant could not demand payment, for appellant at that time was under no obligation to pay it, and he could obtain, only what he did obtain, a promise to pay in case the paper was indorsed. In other words, he obtained an acceptance of his paper, and not a certification. The first does not relase the drawer. The latter does. The drawer and acceptor were jointly liable to the trustee, and the suit could be maintained in the domicile of either. The facts were fully stated in the petition, and showed a liability on the part of appellant to the trustee, and a direct allegation of a promise to pay was not necessary. The only parts of the letter from W. F. Woods to Cogley, appellant's cashier, that were relevant, were those referring to the fact that the draft had been drawn, and that part showing that Woods was interested in the transaction about the land, but we can see no reason why the whole letter should not have been admitted in evidence. We see no pertinency in the other letters excluded.

The bill of exceptions upon which the twentieth assignment of error is founded does not disclose what Cogley would have testified Yzaguirre said when he presented the draft, and, of course, this court is unable to ascertain whether his statement was material or not.

It was error to permit the trustee to swear to the statements made to him by W. F. Woods. Such statements could not bind appellant. They were hearsay and involved a conclusion of Woods, as well as of the trustee who was testifying. The letter from appellant to Woods National Bank was admissible, not as showing an acceptance of the

Digitized by Google

draft, but, having been written the day after Thaison presented the draft, it was admissible as corroborative of his statements as to the acceptance. The statement of Thaison made at Rio Grande City, having been presented to Cogley at Laredo and indorsed except in one particular, was admissible as tending to impeach the evidence of Cogley at the trial and as an admission on the part of appellant. The telegram of the bank examiner to appellant after the failure of Woods National Bank was properly excluded, as well as the reply to it. Such evidence could not affect the liability of appellant. Knowledge of the trustee as to there being no funds of Woods National Bank with appellant to meet the draft could not relieve appellant of the effect of its acceptance of the draft, unless, perhaps, there had been an allegation of conspiracy upon the part of trustee, the beneficiaries, and the officers of Woods National Bank to defraud appellant.

For the errors indicated, the judgment is reversed and the cause remanded.

ROESSLE v. LANCASTER.

(Supreme Court, Appellate Division, First Department. January 8, 1909.)

114 N. Y. Supp. 387.

BILLS AND NOTES — INDORSEMENT BEFORE DELIVERY — NATURE OF LIABILITY — ACTION — ISSUES, PROOF AND VARIANCE — FRAUDULENT REPRESENTATIONS — DEFENSE BY INDORSER — ACTION AGAINST INDORSER — QUESTION FOR JURY.

1. Negotiable Instruments Law (Laws 1897, p. 734, c. 612, § 113) provides that a person placing his signature on an instrument otherwise than as maker is deeemed to be an indorser, unless he clearly indicates an intention to be bound in some other capacity. Section 114 provides that, where a person not a party to an instrument places his signature thereon before delivery, he is liable as indorser where the instrument is payable to the order of a third person. The lessor of a hotel, on default of the lessee, made a lease of the hotel to K. on coidition that L. would stand as guarantor of the performance of the lease. It was also agreed that the lessor should purchase the furniture owned by the former lessee and transfer the same to K. at a stated consideration. As a part of the price of the furniture, K. executed a note, containing the blank indorsement of L., and such note was accepted by the former lessee as a part of the purchase price of the furniture. Held, that L. was liable as an indorser of the note, and not as a principal obligor.

2. Where, in an action on a note by an indorser thereof, the complaint bases defendant's liability on his act in indorsing the note before delivery, and does not allege that defendant signed the note as a maker or principal, evidence of transactions between the principal maker and the payee of the note, and which formed the consideration of the note, was not admissible.

3. Where a note given for the purchase price of the furniture in a hotel was indorsed by defendant before its delivery to the seller of the furniture, and such indorsement was made on the fraudulent representation of the seller as to the earning capacity of the hotel, defendant was entitled to interpose such fraud as a defense

Digitized by Google

to the note without offering to rescind the contract of sale or to restore the furniture to the seller.

4. Where the seller of the furniture of a hotel refused to complete the contract of sale unless the buyer procured an indorser to a note given for a part of the purchase price, such indorser could interpose the defense, in an action on the note, that the indorsement was procured by the fraudulent representations of the seller as to the earning capacity of the hotel.

5. In an action against the indorser of a note, evidence held sufficient to present a question for the jury as to whether the indorsement was procured by fraudulent representations.

Appeal from Trial Term, New York County

Action by Ellwood O. Roessle against Frederick J. Lancaster. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed and remanded.

See, also, 119 App. Div. 368, 104 N. Y. Supp. 217.

Argued before PATTERSON, P. J., and McLAUGHLIN, INGRAHAM, CLARKE, and HOUGHTON, JJ.

Charles F. Brown, for appellant. William R. Wilder, for respondent.

INGRAHAM, J. Upon the first trial of this action the court directed a verdict for the plaintiff upon the pleadings and the defendant's opening. The judgment entered thereon was reversed. 119 App. Div. 368, 104 N. Y. Supp. 217. The nature of the action is stated in the opinion on that appeal, and it is not necessary to restate it here. We there held that, as the defendant was sued as an indorser upon a promissory note, the defendant's contract with the plaintiff was in effect that of a surety for the maker of the note, which was quite distinct from the contract of the maker, and that in an action against the surety upon his contract of suretyship it was a complete defense to show that he was induced to enter into the contract by false representations made by the plaintiff in the action to enforce the obligation. Upon the retrial the court held as a matter of law that the defendant was liable as a principal on the note, and, therefore, he was bound to return the property which he, as principal, had received, for the purchase of which the note was delivered, before he could defend an action upon the ground that the indorsement was obtained by fraud. It appeared that the plaintiff had been the lessee of a hotel known as the "Gilsey House" for some time prior to March 1, 1904, at which time the rent was $69,000 a year. He was in arrears for rent and taxes about $30,000, and the business had not been profitable. About January 4th he notified the landlord that he could not pay the rent and taxes then due. The landlord had been looking about for a new tenant for the property. One Albert R. Keen, who appears to have had a business connection with a corporation in which the defendant was interested, commenced negotiations with the landlord for a lease of the hotel.

On the 31st of December, 1903, an agreement was executed between the heirs of Peter Gilsey, the landlord and said Keen, by which the heirs of Gilsey agreed to lease the premises known as the "Gilsey

Digitized by Google

House" to A. R. Keen, and Keen agreed to hire the same from such date as the present lessee (the plaintiff) should cancel his lease and deliver possession of the premises to the Gilsey heirs to the 1st day of May, 1911, at the rent of $75,000 per annum, and Keen agreed to deposit $75,000 as security for the fulfilment of the covenants and conditions of the said lease. This agreement was based upon the Gilsey heirs being able to obtain a cancellation of the lease to the plaintiff, and also upon Keen being enabled to purchase all the furniture and equipment then in the Gilsey House, and belonging to the plaintiff, for the sum of $50,000. At that time the defendant had no other business relations with Keen, except that Keen was to manage a hotel that belonged to a corporation in which the defendant was interested. When this agreement was offered in evidence by the plaintiff it was objected to as immaterial, incompetent, and irrelevant, which objection was overruled, and the defendant excepted. After Keen had received this instrument from the Gilsey heirs, he had an interview with the defendant, and subsequently the defendant had various interviews with the Gilsey heirs. The defendant then had an interview with the plaintiff on the 10th of January, and on the 20th of January he wrote a letter to the representative of the Gilsey heirs which was offered in evidence by the plaintiff, objected to as irrelevant, immaterial, and incompetent, and as having nothing to do with the issues in this case, which objection was overruled, and the defendant excepted. In that letter the defendant stated that he had given the matter careful consideration, but was disinclined to become interested unless he could see that Keen could successfully work out his plan in the management of the plant, which the defendant feared he could not do, as he at the outset was going heavily in debt, but he would be inclined to take up the matter if the Gilseys would accept a proposition to lease the hotel at a rental of $75,000 per year, and provided the Gilseys could arrange to purchase the furniture from the present owners and sell it to Keen at the price they paid for it, Keen to pay it off in instalments; that if the Gilseys would not entertain that proposition defendant would withdraw from the matter and leave it to Keen to do as he thinks best.

The plaintiff then offered in evidence a communication to the Gilsey heirs dated January 23, 1904, by which Keen proposed to take a lease of the Gilsey House upon certain terms therein stated, upon which there was an indorsement signed by the defendant stating that if Keen's proposition was accepted he would endeavor to carry it through before February 1st. This proposition does not seem to have been accepted, and on January 25th the Gilsey heirs made a proposition to Keen which contained no reference to the defendant. The plaintiff then offered in evidence another proposition signed by the defendant and Keen, which was submitted about February 1st, which propsed that there should be a corporation organized which was to acquire the lease of what was known as the "Edgmere Hotel;" that the Gilsey estate was then to lease the Gilsey House to Keen on the terms before agreed to, who was then to assign the Gilsey House lease to the new corporation; and Keen and the defendant were to agree to deposit with the trustee $100,000 in stock of the new corporation to secure the payment of the rent of the Gilsey House, and the defendant agreed to furnish a collateral bond to further secure the payment

Digitized by Google

of such rent in the sum of $37,500. This was objected to by the defendant upon the same grounds as the former instruments as being incompetent, irrelevant, and immaterial, and as having nothing to do with this case; that objection was overruled, and the defendant excepted. Nothing seems to have come of this proposition, but on February 20, 1904, Keen submitted another proposition to the Gilsey heirs, which was for a lease of the Gilsey House for seven years and two months at a rental of $75,000 per annum, Keen to purchase from the Gilsey heirs the furniture now contained in the hotel for the sum of $50,000, payable one-half in cash and the balance in Keen's promissory notes; and Keen agreed to procure a bond for the sum of $37,500 to be executed by the defendant to secure the payment of the rent and of the notes given for the furniture, title to the furniture to remain in the Gilsey estate until fully paid for in cash. Indorsed on that proposal was a statenment, signed by the defendant, that if the proposition was accepted he would agree to carry it out before March 1, 1904; and it was this proposal which was finally accepted by the Gilseys. A corporation known as the "Seaboard Hotel Company" was organized two or three days before the 1st of March. One hundred thousand dollars of the stock of this corporation was issued to Keen, of which half was transferred by Keen to the defendant, who thereupon transferred it to the Gilsey heirs as security for the obligations of Keen under this agreement to the Gilsey heirs. This testimony was also objected to by the defendant on the same grounds; the objection was overruled, and the defendant excepted. And it was this transaction upon which the court held as matter of law that the defendant was liable upon this note as principal, and not as indorser.

The complaint alleges that the defendant Keen had made his promissory note in writing, of which a copy is set forth, and delivered the same to the plaintiff for value, and that, before such note was delivered to the payee, the plaintiff, the defendant Lancaster, indorsed the same for value. When the note became due it was presented for payment, payment demanded and refused, it was protested for nonpayment, and notice of protest was given to Keen, the maker of the note, and defendant Lancaster, the indorser thereon. There is no allegation in the complaint that this defendant was a principal, the only allegation being that he was an indorser.

Prior to the Negotiable Instruments Law (chapter 612, p. 719, of the Laws of 1897) the defendant, upon this complaint, would not have been liable to the payee of the note as an indorser (Coulter v. Richmond, 59 N. Y. 478), but section 113 of the Negotiable Instruments Law provides that:

"A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

And section 114 provides that:

"Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules: First, If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties."

Thus, under this provision, Lancaster became liable to the plaintiff,

Digitized by Google

the payee of the note, as an indorser, there being no indication of an intention to be bound in any other capacity. This defendant was thus treated as an indorser by the plaintiff, and the action was brought against him based upon that relation to the note. The suit was on the note. Neither the defendant nor Keen had any direct relations with the plaintiff except that based upon the obligations evidenced by this note, and but for this note there was no obligation of either Keen or the defendant to the plaintiff. The note seems to have been given because of the fact that by the arrangement between Keen and the Gilseys, Keen was to pay to the Gilseys $25,000 in cash on account of the furniture which the Gilseys had agreed to sell to Keen. Keen had requested the Gilseys to accept $20,000 in cash and a $5,000 Keen note, which the Gilseys had agreed to accept on condition that the plaintiff would accept the note on account of the cash that the Gilseys were to pay to the plaintiff for the furniture. The defendant applied to the plaintiff to accept Keen's note, and he refused unless the defendant would indorse the note, which the defendant finally agreed to do, and thus Keen's note for $5,000, the note in suit, indorsed by the defendant, was delivered by Keen to the Gilseys as a part payment on account of such furniture, and was accepted by the plaintiff from the Gilseys as so much cash in the transaction between them. Assuming that the defendant could be held as between the Gilsey heirs and Keen as a principal in relation to the transactions between them, upon this evidence it is impossible for me to see how the plaintiff could hold the defendant as a principal in relation to this note. The plaintiff agreed to accept the note on condition that it was indorsed, and it was so indorsed, but not as part of any arrangement between Keen and this defendant with the plaintiff by which either Keen or the defendant was to receive a title to the furniture or any interest therein from the plaintiff. I cannot see that this arrangement between Keen and the defendant and the Gilseys had any more to do with this note than if the plaintiff had been a third party purchasing a note made by Keen and indorsed to the defendant. Neither Keen nor the defendant were under any obligation to pay the plaintiff anything, but the plaintiff, however, agreed to accept this note of Keen's indorsed by the defendant in lieu of a payment of $5,000 which the Gilsey heirs had agreed to pay to the plaintiff. It seems to me obvious that the only claim that the plaintiff could possibly have against either Keen or the defendant was based upon the note, which upon its face was Keen's promise to pay, indorsed by the defendant. The only liability there was or could be as between the plaintiff and the defendant was that of an indorser upon Keen's obligation. But assuming that the plaintiff had sought to hold Keen as a principal instead of an indorser, it is quite necessary, it seems to me, that there should have been appropriate allegations in the complaint basing defendant's liability upon such an obligation, and that an action based solely upon defendant's liability as indorser could not upon the objection of the defendant be turned into an action to hold such an indorser as a maker or principal in the transaction out of which the obligation arose. And thus all this testimony expressly objected to as having nothing to do with the issues presented in this action was erroneously admitted in evidence, when no such issues were presented by the pleadings.

But assuming that the action was properly brought, I do not think

Digitized by Google

that upon this evidence the defendant Lancaster could be held as a principal in relation to the transaction as between Keen and the Gilseys. The proposition that was finally accepted was that the Gilseys should execute a lease of the hotel to Keen, which lease Keen was to transfer to a corporation to be incorporated, and a certain percentage of the capital stock of that corporation transferred to the Gilseys as security that Keen would perform his obligations under the lease and agreements, and Keen was to give as additional security a bond of the defendant in the penalty of $37,500. It was thus Keen and the corporation who were to be the lessees, and it was Keen's note for $25,000 that was to be accepted by the Gilseys as part payment for the furniture the Gilseys were to purchase from the plaintiff and transfer to Keen. There was annexed to this proposal an agreement by Lancaster to carry it out on or before March 1, 1904. In the proposition Keen undertook to procure this bond of $37,500 from Lancaster, and Lancaster's agreement to carry out the agreement, I think, clearly referred to his undertaking to give the bond which Keen had agreed to procure from him. But assuming that Lancaster had assumed an absolute obligation to the Gilseys that this proposal, if accepted, should be carried out by Keen, the evidence is undisputed that it was carried out by Keen; that Lancaster gave the bond; and that Keen gave the notes he was to give, and executed the lease that it was provided in the agreement should be executed by the Gilsey heirs to Keen. A corporation was organized, the Gilsey House lease was transferred to it, and the stock of the corporation was transferred to the Gilseys as security for Keen's obligations under the lease. Lancaster's agreement, therefore, was strictly complied with. There was no agreement or proposal that Lancaster should be liable either upon the lease or upon the Keen notes, and Lancaster's only interest in the whole transaction, so far as appears anywhere in this record, was the fact that he was the owner of a considerable portion of the stock of the corporation to which the Gilsey House lease was transferred and who undertook to operate the hotel. The corporation was organized before the lease was executed, in accordance with the agreement between Keen and the Gilsey heirs. Just what was contemplated by the accepted proposition was accomplished, and it seems to me clear that the defendant would not have been responsible either to the Gilsey heirs for the rent reserved by the lease, or for the notes that Keen had given to the Gilseys to be applied on the $50,000 — the consideration for the transfer of the furniture from the Gilseys to Keen. I think, therefore, the court was clearly in error in holding that Lancaster could be held as a principal in the transaction, or that he was liable to the plaintiff in any way except as an indorser on the note given by Keen under his contract to purchase this furniture from the Gilseys. If this is so, it is quite evident that the defendant was under no obligation to rescind the contract and restore the furniture that the Gilseys had sold to Keen or the corporation as a condition of setting up a defense that his indorsement upon the note had been procured by false and fraudulent representations made to him by the plaintiff. It is quite evident that Keen's ability to pay this note would depend upon his successful conduct of the hotel business at the Gilsey House. It was understood by all the parties that Keen was substantially without means. The Gilseys had required the defendant to give a bond for

Digitized by Google

$37,500 to secure the rent and the notes that Keen had given them on account of the purchase of this furniture, and when Keen made an application to the Gilseys, and subsequently to the plaintiff, to accept this $5,000 note in lieu of so much cash that he had agreed to pay upon the execution of the lease for the furniture, the plaintiff refused to accept the note unless the defendant indorsd it. If Keen was unsuccessful in the hotel business that he contemplated conducting at the Gilsey House, it is quite evident that the defendant would have to pay this note, and it was of the utmost importance, therefore, for him to be assured that the hotel business there conducted was a profitable one, so that Keen would be able to meet the note when due. The plaintiff had been conducting this hotel for years, and was necessarily acquainted with the nature of the business and its character, and whether or not it was a profitable business; and if he, by making distinct representations as to the character of the business and as to whether or not it was profitable, induced the defendant to indorse Keen's note for this amount, which Keen could only pay out of the profits of the business, and such representations were false and fraudulent, and known by the plaintiff to be so when made, and were believed and relied upon by Lancaster in making the indorsement, it necessarily follows that the plaintiff could not enforce the liability created by the indorsement as against the indorser, whose indorsement had been thus procured by the plaintiff's fraud

Lancaster was called as a witness, and testified that had several conversations with the plaintiff in January, 1904. That at the first conversation, had about January 10th, the defendant told the plaintiff that he called on the plaintiff in behalf of Mr. Keen, who had been talking with the Gilsey people about taking up a lease of the Gilsey House for the unexpired term of his lease. That the defendant had called upon the plaintiff to ascertain why he wanted to give the property up, and also to make some inquiry regarding the business. That the plaintiff said:

"The only reason that I would give the house up is that I have an opportunity to join my father in the management of the Arlington Hotel at Washington, and I am considering whether it is better for me to go there and give this up or to remain there, and I haven't fully determined."

That defendant then said he would like to make some inquiries about the plaintiff's business, and asked to see the plaintiff's books, to which the plaintiff replied that if he concluded to give it up, and Keen succeeded in making arrangements with the Gilseys, he would give the defendant a written statement of his books. Defendant then asked the plaintiff if his business had been prosperous, and defendant said, "Oh, yes." That defendant asked if he had made money there, to which plaintiff said:

"Yes; that he took the hotel May 1, 1900, and at that time they were making some alterations to the house which caused him to run behind that first season, and that he had been obliged to borrow some money from his father, but from that time on the business had been good, so that he had repaid his father and had paid some $80,000 for furnishing the house."

That defendant then asked plaintiff if that had been made out of the business, to which plaintiff said "Yes," referring the defendant to

Digitized by Google

various business houses with which he had transaction. The plaintiff made further statements in relation to the room rents and his restaurant receipts and other receipts of the hotel, and stated that the average total receipts were about $300,000 a year. Plaintiff then made statements as to his expenses, and that these receipts and expenses were the average per year during the time that the plaintiff had been there. From these statements it was apparent that the hotel business was quite profitable, and these statements were referred to when plaintiff asked defendant to indorse the note in suit. There was evidence then offered tending to show that if these statements were made they were untrue; that the businss had been run at a considerable loss, so that the Gilseys had reduced the rent from $75,000 to $69,000 a year; that the business at the hotel could not be made to pay at a rental of $69,000 a year; and that the statements in regard to the receipts and disbursements of the hotel were false.

Upon the former appeal (119 App. Div. 368, 104 N. Y. Supp. 217) we held that the defendant's obligation as indorser upon this note could not be enforced if it was induced by false and fraudulent representations made by the plaintiff, the payee of the note; that under such circumstances the defendant was not bound to restore the property purchased by the maker of the note; and that the answer set up a good defense.

At the end of the case, when counsel for the defendant asked to go to the jury as to whether or not the representations were made and whether or not they were untrue, the court said: "I assume that they were made, and I assume that they were false." Counsel for the defendant then said: "I want to go to the jury, then, on the question of the relation between these parties;" to which the court replied: "There is nothing to go to them on that question." The defendant excepted to the refusal to submit these questions to the jury, and the court then directed a verdict for the plaintiff for the full amount claimed, to which the defendant excepted. I think it clear that there was evidence to go to the jury as to whether or not the plaintiff did induce the defendant to indorse this note by false and fraudulent representations, and that the court was therefore wrong in directing a verdict for the plaintiff.

The judgment and order appealed from should therefore be reversed, and a new trial ordered, with costs to the appellant to abide the event.

McLAUGHLIN, J., concurs.

PATTERSON, P. J., and CLARKE and HOUGHTON, JJ. We think there was a question to go to the jury, and therefore concur in the result.

Digitized by Google

BICK v. CLARK et al.

(St. Louis Court of Appeals, Missouri. December 29, 1908.)

114 S. W. 1144.

ASSUMPSIT, ACTION OF — PLEADING UNDER THE CODE — PROMISE TO PAY — BILLS AND NOTES — DEFINITION OF "PROMISSORY NOTE" — PLEADING PROMISE TO PAY — PLEADING DESIGNATING PAYEE.

1. It is sufficient under the code to state facts in an action in assumpsit from which the promise to pay would be implied.

2. A "promissory note" is defined to be an unconditional promise in writing for the payment of a certain sum of money absolutely.

3. An allegation that a promissory note was executed and delivered to persons named implies a promise to pay.

4. Where it is averred that a promissory note was executed to a person named, it sufficiently designates him as the payee to give him, prima facie, the right to transfer it by assignment.

5. Though a petition does not describe a note sued on as containing a promise to pay, the description thereof as a promissory note implies that it contains such a promise.

Appeal from Circuit Court, Monroe county; David H. Eby, Judge.

Action by J. J. Bick against J. N. Clark and others. There was a judgment for defendants on sustaining a demurrer to the petition, and plaintiff appeals. Reversed.

T. P. Bashaw, for appellant. Ragland & McAllister, for respondents.

GOODE, J. The question on this appeal is whether the following petition is good; a demurrer having been sustained to it and final judgment entered on the demurrer: "Plaintiff for his second amended petition, by leave of court first had, for cause of action against defendants states: That defendants executed, signed, and delivered their promissory negotiable note for value received to R. B. Palmer & Sons, for $57, dated November 21, 1893, due in one year after date with eight per cent. interest from date to compound annually, which note was assigned and transferred by R. B. Palmer & Sons for value received to J. J. Bick, this plaintiff, on December 9, 1902, and is attached with the original petition in this suit marked 'Exhibit A' and made a part of this procedure; that the principal and interest of said note is now long since past due, owing, and unpaid, with damages aggregating $250, for which amount plaintiff asks and prays for judgment against defendants with eight per cent. interest to compound annually and costs of suit." The note declared on was attached to the petition as an exhibit.

There is no brief for defendants, but we suppose the contention in favor of the demurrer is that the petition contains no averment of a promise by defendants to pay the note, and this, it seems, would have been a good point under the early decisions enforcing the common-law rules of pleading. Muldrow v. Tappin, 6 Mo. 277; Moore v. Platte Co., 8 Mo. 467. It is sufficient under the code to state facts

Digitized by Google

$ 9000.00 Memphis, Tenn. Sept 1 1905.

Six months after date I promise to pay

to the order of myself

Nine Thousand Dollars

Payable at Mercantile Bank

Value received

No. Due

B. F. Bailey

COLUMBIA BOND

Digitized by Google

B. I. Busby
By B. I. Busby Sec.
By B. I. Busby Pres.
C. B. Blackburn
Kacoma, Ark.

H. F. Williford

PAY AMERICAN EXCHANGE NATIONAL BANK, NEW YORK, N. Y.
or order
MERCANTILE BANK OF MEMPHIS, TENN.

W. A. Smith
Cashier

C. H. Raine
Pres.

The Mercantile Bank of Memphis, Tenn., sued the first four indorsers of this note, obtaining a verdict in its favor. Blackburn, the third indorser, appealed, contending as he had not received notice of the note's dishonor he was released. It will be noticed that the four indorsers above and the Mercantile Bank of Memphis are immediate parties, that is, they dealt with each other. Remote parties to a negotiable instrument are parties who have not dealt with each other. The evidence showed that all four of the stockholders were bound equally, that this note was a renewal note of another note for $12,000, payable to the Mercantile Bank, upon which the Agar Packing Company was an indorser, $3,000 having been paid on the old note. The president of the B. I. Busby Corporation notified the stockholders, at a board of directors' meeting (the four stockholders above named being all the stockholders and also members of the board of directors), that he did not wish to have the Agar Packing Company indorse the renewal note, and these stockholders agreed to indorse it. The Negotiable Instruments Law provides that no notice of dishonor is required to be given an indorser where the instrument was made or accepted for his accommodation. The court held that this instrument was made for the accommodation of all of the above indorsers, therefore no notice was necessary to charge any of them, consequently no notice was necessary to charge C. B. Blackburn.

Digitized by Google

in an action in assumpsit from which a promise to pay will be implied. Nat. Bank v. Landis, 34 Mo. App. 433, 440. This petition alleges the execution, signing, and delivery to R. B. Palmer & Sons of a negotiable promissory note and states the principal, the date of execution, date of maturity, and the interest as they are given in the note. A "promissory note" is defined to be "An unconditional promise in writing for the payment of a certain sum of money absolutely." 3 Kent, Comm. 74; Daniel, Neg. Inst., § 28. An allegation that a promissory note was executed and delivered necessarily implies a promise by the maker to pay, and an allegation that such a note was executed and delivered to a person or persons named (in this case Palmer & Sons) implies a promise to pay whomsoever is mentioned. This might not follow from a mere allegation that it was delivered to said person; but, when the averment is also that it was executed to him, he is sufficiently designated as the payee to give him, prima facie, the right to transfer the note by assignment. In the case of Bank v. Landis, cited supra, the pleader described the note as one whereby, for value received, the defendant promised to pay to the order of the plaintiff the sum mentioned. This, however, was but a statement of the terms of the note, and not a distinct averment of a promise to pay, and the contention in that case was there should have been a distinct averment. Though in the present case the petition does not describe the note as containing a promise to pay, the description of it as a promissory note implies that it contained such a promise.

We have no doubt the petition states a good cause of action, and the judgment will be reversed, and the cause remanded. All concur.

Bills and Notes: Indorsers: Negotiable Instruments Law: Persons Entitled to Notice of Dishonor.

The Mercantile Bank of Memphis, Tenn., was the holder of a promissory note similar to the illustration. It sued the indorsers, B. I. Busby, B. I. Busby Company, C. B. Blackburn, and H. L. Williford. It recovered judgment, from which the defendant Blackburn appealed. Blackburn contended that he was not given notice of the note's dishonor, the notice having been directed to a wrong address and sent to E. B. Blackburn instead of C. B. Blackburn. He held he was entitled to a notice of dishonor under the Negotiable Instruments Law which was passed in the State of Tennessee in 1899. Under the law, as it existed in the State of Tennessee prior to 1899, no notice need have been given to for him for the reason that he would have been considered a joint maker of the note. The court affirmed the judgment, holding that the money was loaned by the bank to the indorsers and that the real contract could be shown as between the immediate parties to the note. The facts were that the B. I. Busby Company, which was a firm composed of B. I. Busby and C. D. Williford, turned over its assets to the B. I. Busby Company, a cor-

Digitized by Google

poration, the stockholders of which were the four above-named indorsers; that the corporation also assumed the indebtedness of the former company, in which was included a note for $12,000, indorsed by the Agar Packing Company. This indebtedness was reduced to $9,000, and the president of the B. I. Busby corporation, at a board of directors' meeting, stated that he did not wish to have the Agar Packing Company indorse the renewal note. The four stockholders agreed to indorse the renewal note, and the evidence showed that the stockholders were all bound equally. The court held, furthermore, that under the Negotiable Instruments Law, which provides that notice of dishonor is not required to be given to an indorser where the instrument was made or accepted for his accommodation, no notice was required to charge these indorsers, as the note was made and accepted for their accommodation, therefore no notice was necessary to charge C. B. Blackburn.

The court said in part:

"Under the authorities in this State prior to the passage of the Negotiable Instruments Law in 1899, the parties being liable on said note as joint makers were, of course, not entitled to notice of protest and non-payment. Bank v. Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; Assurance Society v. Edmonds, 95 Tenn. 53, 31 S. W. 168; Logon v. Ogden, 101 Tenn. 392, 47 S. W. 489; Bank v. Lumber Co., 100 Tenn. 479, 47 S. W. 85. In this view of the case, it is an immaterial consideration that the notice of protest was sent to C. B. Blackburn at Laconia, Ark. It is insisted, however, on behalf of the defendant, that this rule has been changed by our Negotiable Instrument Act of 1899 (Laws 1899, p. 152, c. 94), and now a party to an instrument who is not a maker, drawer, or an acceptor is an indorser, and therefore entitled to notice of dishonor. The contention is that when a person's name appears on the back of a note, whether as a regular indorser or as an irregular indorser, he is to be held strictly as an indorser, and in no other capacity, unless he clearly indicates by appropriates words written on the note his intention to be bound in some other capacity. The particular sections of the Negotiable Instruments Act relied on are as follows:

"'Sec. 63. A person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

"'Sec. 64. Where a person not otherwise a party to an instrument places thereon his signature in blank, before delivery, he is liable as indorser in accordance with the following rules:

"'(1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties.

"'(2) If the instrument is payable to the order of the maker or drawer or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"'(3) If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.'

Digitized by Google

"It is argued that, under the express language of section 63 of the Negotiable Instruments Act, C. B. Blackburn must be deemed to be an indorser of the note in question, because there were no written words attached to the indorsement indicating his intention to be bound in some other capacity. It is said this result inevitably follows 'unless he clearly indicates by appropriate words,' etc. It is insisted that this construction is reinforced by the language of the succeeding section 64.

"Counsel cites Thorp v. White, 188 Mass. 333, 74 N. E. 592, also the case of Downey v. O'Keefe (decided in 1905), 26 R. I. 571, 59 Atl. 929.

"On the other hand, it is insisted on behalf of the complainant that the Negotiable Instruments Act merely defined what kind of instrument creates a prima facie liability as indorser, and that the real contract can be shown now just as it could have been shown before the act was passed. In Bunker on the Negotiable Instruments Law, the author, after referring to section 66 of the Negotiable Instruments Law of Michigan (Public Act 1905, p. 399, No. 265), which is the same as section 64 of the Tennessee act on the same subject, says:

"'This section was construed by the Supreme Court of New York in Kohn v. Consolidated Butter & Eggs Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265. But the case was outside of the statute, in that it was alleged that the maker made and delivered the note to the payee and that thereafter the other defendants indorsed the note.'

"McAdam, Judge, said:

"'The true intention of indorsers as between themselves can always be shown by oral evidence. To go further and decide that the statute intended to create an incontestible liability against irregular indorsement would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interests of law reform.'

"The case of Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658, is cited for the proposition that in the State of New York liability created by the Negotiable Instruments Law is simply prima facie.

"That was an action upon a promissory note brought against the executors of the first accommodation indorser by the second accommodation indorser who had been compelled to pay a judgment recovered against her upon the note by the payee named therein. The complainant alleged the making and delivery of a note to Kate A. Weichel, which, before its delivery to her, was first indorsed by the defendant's testator, and then by the plaintiff for the accommodation of the maker. It then alleged presentment, non-payment, and notice thereof to each of the indorsers; next that thereafter the payee sued the plaintiff as indorser of the note, notice of which action was given to the defendants, and a judgment therein was recovered against the plaintiff for the amount of the note, interest, and costs, which was paid by her. The sum so paid she seeks to recover from the defendants on the indorsement by their testator. Said the court: 'It was formerly the rule in this State that, in the absence of any further agreement, such an indorser would not be liable to the payee of the note. To establish its liability, it had to be shown that he had indorsed the note for the purpose of giving the maker credit with the payee. Philips v. Vischer, 50 N. Y. 69, 10 Am. Rep. 433. The same would

Digitized by Google

formerly have applied to the plaintiff, whose liability would spring entirely from a special agreement on her part (beyond that which the law implied upon the mere fact of the indorsement) that such indorsement was for the purpose of giving the maker credit with the payee. . . . Section 114 of the Negotiable Instruments Law of 1897 (Laws 1897, p. 734, c. 612) provides that, where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorsee to the payee, and to all subsequent parties, if the instrument is payable to a third person. Before that provision was enacted, a third party could not be charged as an indorser of a promissory note before delivery, unless the complainant alleged that the indorsement was made in order to give the maker credit with the payee, or that the party indorsed the note as surety for the maker. The omission of such an allegation was held to be a fatal defect in an action to charge such an indorser. The necessity of an averment to that effect appears no longer to exist. However, in view of the plain language of section 114 of the Negotiable Instruments Law, it seems to require nothing more than the simple fact of the indorsement to render the defendant prima facie liable in such a case. McMoran v. Lange, 25 App. Div. 11, 49 N. Y. Supp. 310. The cases of Thorpe v. White and Downey v. O'Keefe are cited by counsel for appellant as announcing a contrary rule. In Thorpe v. White, (June 19, 1905) 188 Mass. 333, 74 N. E. 592, it appeared:

"'The defendant, Hannah C. Hand, irregularly became a party to the promissory note set forth in the bill of complainant, as before delivery she signed her name in blank on the back of an instrument of which the defendant White was the maker and the plaintiff the payee.' Du Bois v. Mason, 127 Mass. 37, 38; s. c., 34 Am. Rep. 335.

"The court said:

"'According to the law relating to negotiable promissory notes before Statutes 1898 (Laws 1898, p. 502, c. 533) took effect she was liable as a promissor between herself and the plaintiff, although entitled to notice as if she were an indorser when the note was not paid at maturity by the maker (citing cases). But, after the Negotiable Instruments Act became operative, the distinction was abolished, and the effect of her signature was to make her an indorser as to all parties.'

"In Downey v. O'Keefe, (January 18, 1905) 26 R. I. 571, 59 Atl. 929, the court said:

"'Action on a note by Michael R. Downey against Joseph O'Keefe and another. The note was as follows:

"'$275.00. Providence, March 18, 1899.

"'Six months after date we promise to pay to the order of Michael R. Downey Two Hundred and seventy-five Dollars at his office, No. 712 Banigan Building, with interest at 5% per month, value received.

"'Joseph O'Keefe,
"'Dennis J. O'Connor.'

"Upon the back was the signature of John McCann. It was shown in evidence that the note was signed by the makers and delivered to one Hart, the agent of the plaintiff, who took it to McCann, and procured his indorsement. The executor of McCann resisted the suit, and prays for a new trial on the ground that his testator was a mere

Digitized by Google

accommodation indorser, and did not sign until after the delivery of the instrument. . . . It has been uniformly held in Rhode Island until the passage of the Negotiable Instruments Act (Pub. Laws 1898–1899, p. 222, c. 674), which does not apply to instruments before July 1, 1899, that one who indorses a note payable to another before its issue is liable to the payee as a joint maker (citing authorities). It makes no difference whether the signature is actually indorsed upon the note before or after it comes into the possession of the payee, if it is part of the agreement that the note shall be so indorsd to be acceptable (citing authorities).' We do not think these cases necessarily decide that under the Negotiable Instruments Law an instrument under circumstances like these renders the party absolutely liable as indorser, since no special agreement was shown. We are of opinion that the real contract between the parties can be shown now as fully as it could have been shown before the passage of the Negotiable Instruments Act, and that, as between the immediate parties, it is not necessary that the indorsement should be accompanied by appropriate words, in writing, showing an intention to be bound in some other capacity. As to innocent holders for value, the rule, of course, would be otherwise, and the statute would apply. So far from an intention manifested by the legislature to destroy this well-established rule we think section 63 of said act, providing that the person is to be deemed an indorser unless by appropriate words he is bound in some other capacity, is but a legislative recognition of the rule prevailing at the date of the passage of the act.

"There is another reason why notice of dishonor of the note in suit was not necessary to be given the defendant, C. B. Blackburn. Section 115 of the Negotiable Instruments Act provides that:

"'Notice of dishonor is not required to be given to an indorser in either of the following cases:

"'1st. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

"'2d. Where the indorser is the person to whom the instrument is presented for payment;

"'3d. Where the instrument was made or accepted for his accommodation.'

"In our opinion the facts disclosed in this record show that this note was in reality executed for the benefit of every person whose name appears on it. As already stated, it is established in proof that this was an obligation of the B. I. Busby corporation, and that these parties were all stockholders and directors, and that the note was executed for the purpose of renewing an outstanding indebtedness of the corporation. It is in proof that the B. I. Busby corporation received all the assets and assumed all the liabilities of the firm of B. I. Busby & Company.

"Our conclusion on this branch of the case is that C. B. Blackburn was not entitled to notice of dishonor, since he was a joint maker and equally interested in the note with his co-makers and indorsers. We have also considered the questions made on the alleged alteration of the note, its cancellation, etc., but do not find these assignments of error well taken. It results that the decree of the chancellor must be in all respects affirmed."

See Decision No. 1132.

Digitized by Google

Bills and Notes: Release of Indorsers by Failure to Notify Them of Non-payment and Dishonor.

The J. W. Perry Company brought an action against Taylor Brother and others upon a promissory note payable to the order of the said J. W. Perry Company for $2,500. Before the delivery of the note to the plaintiff, J. T. Bowles and A. F. Moye indorsed the note in blank. The note was not paid at its maturity, and no notice of its dishonor was given these two defendants, Bowles and Moye. On the trial of the action these two defendants were released, and the plaintiff appealed. The Supreme Court of North Carolina affirmed the judgment of the trial court. The court held, under the Negotiable Instruments Law, that a person who places his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, consequently these individuals were indorsers. Furthermore, presentment for payment is not necessary to charge the person primarily liable, but is necessary in order to charge the indorsers, and notice of dishonor must be given to each indorser and any indorser, to whom such notice is not given, is discharged.

The court said in part:

"Whatever may have been the law heretofore, it is now provided, and was so provided at the time the note upon which this suit was brought was given, as follows: 'A negotiable promissory note, within the meaning of this chapter, is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable time, a sum certain in money to order or to bearer.' Revisal, 1905, § 2334. 'A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.' Revisal 1905, § 2212. Where a person, not otherwise a party to the instrument, places thereon his signature, in blank, before delivery, he is liable as indorser (under the rules specified in the section).' Revisal 1905, § 2213. 'Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.' Revisal 1905, § 2219. 'Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.' Revisal 1905, § 2239.

"It appears, therefore, that as the defendants placed their signatures on the back of the note, and they were not otherwise parties to

Digitized by Google

the instrument, they became liable as indorsers, and were entitled to notice of dishonor after its maturity. Eaton & Gilbert on Commercial Paper, § 108. The case of Rouse v. Wooten, 140 N. C. 558, 53 S. E. 430, 111 Am. St. Rep. 875, which was cited by the plaintiff's counsel, does not bear on this case, as there the defendant was a surety, and so found to be by the jury. The only question raised to notice of non-payment and dishonor. We held that he is not. The ruling of the judge was correct."

See Decision No. 1133.

Bills and Notes: Holder in Due Course: Burden of Proof.

The defendant, S. K. Fountain, executed a note to B. A. Blenner, for an automobile, which was sold by Blenner to the defendant. Blenner indorsed the note to the plaintiff, the American National Bank. The note was not paid at its maturity, and the American National Bank sued S. K. Fountain and obtained a judgment, from which he appealed. Defendant Fountain contended that the title of the American National Bank was defective in that the note had been procured by misrepresentations and fraud on the part of Blenner, who sold him the automobile. The plaintiff contended that it was a holder in due course. A holder in due course is one who acquires a negotiable instrument, that is complete and regular on its face, before its maturity, in good faith and for value, and at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person who negotiated it. When it is shown that the title of any person is defective, the burden is on the holder to prove that he acquired the title as a holder in due course. In this case the judge charged the jury that by reason of the evidence offered to establish the fraud, the burden was on the plaintiff; but that the prima facie case of the plaintiff had been restored by the uncontradicted evidence of the president of the bank that it acquired the note in the usual course of business before maturity and without notice of any vice in it. The Supreme Court of North Carolina reversed the judgment of the trial court, holding that the court below had no right to so charge the jury. When the defendant proves the note was obtained from him by fraud, the burden is on the plaintiff to show that he is a holder in due course and whether he has met this burden is a question for the jury and not for the court.

The court said in part:

"There is some conflict of authority as to the extent and proper application of the burden which the laws casts upon a plaintiff, where fraud has been established, or when there has been evidence offered tending to establish it, which is thus referred to in Norton on Bills and Notes, 334: 'In the cases of illegality the rule is the same, and

Digitized by Google

for the same reason. The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show that he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that in addition to proving value the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud. If value and notice are disputed as facts, they must be passed upon by the jury.' The author, in note 92, cites several additional cases in support of the text. In Tatam v. Haslar, supra, it was held 'that when fraud is proved the burden of proof is on the holder to prove both that value has been given, and that it has been given in good faith, without notice of the fraud.' In Vosburgh v. Diefendorf, supra, it is held: '(1) Where the maker of a negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must, before he is entitled to recover thereon, show that he is a bona fide purchaser or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value. He must show that he had no knowledge or notice of the fraud. Thus, after properly placing the burden on the plaintiff, by reason of evidence offered tending to establish fraud, the charge proceeds: "But the plaintiff having responded by showing that it acquired the note bona fide, for value, in the usual course of business, and while it was still current, and before its maturity, the prima facie case of the plaintiff is restored." And again: "The court further charges you that the prima facie case of the plaintiff having been restored by the uncontradicted evidence of the president of the bank that it acquired the note in the usual course of business, before maturity, and without notice of any vice in it," etc.'

"It may be that when fraud is established in procuring the instrument, or there was evidence offered tending to establish it, if the plaintiff, as he is then required to do, should lay before the jury all the evidence available as to the transaction, and it should thereby appeal with no evidence to the contrary, and no other fair or reasonable inference permissible, that plaintiff was the purchaser of the instrument in good faith, for value, before maturity, and without notice, the court properly charged the jury, if they 'believed the evidence,' or if they 'found the facts to be as testified,' a more approved form of expression, they would render a verdict for plaintiff. But here the fraud having been established, or having been alleged, and evidence offered to sustain it, the circumstances and bona fides of plaintiff's purchase was the material question in the controversy; and both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it, was for the jury and not for the court. State v. Hill, 141 N. C. 771, 53 S. E. 311; Riley's Case, 113 N. C. 651, 18 S. E. 168. As said by the court in this last case, the 'plea of not guilty disputes the credibility of the evidence, even when uncontradicted.' His honor below, therefore, had no right to say to the jury, on this very material question: 'The prima facie case of plaintiff having been restored by the uncontradicted evidence of the president of the bank that it acquired the note in the usual course of business, before maturity and without notice

Digitized by Google

of any vice in it.' For this assumes that the statement of the president is to be taken as true, and withdraws that matter from the jury. The precise question was presented in the case of Bank v. Iron Works et al., 159 Mass. 158, 34 N. E. 93, and in that case it was held: '(1) In an action on a promissory note, which was defended on the ground that the note had been fraudulently put into circulation by the P. L. Co., a Massachusetts corporation, organized for the purpose of "doing a brokerage business in commercial paper, stocks, bonds, and other property," from whom the plaintiff company acquired it, the plaintiff's officers testified that the note was taken by them in good faith and for value before maturity, and the defendant introduced no other testimony to contradict these officers. Held, that the defendant was entitled, nevertheless, to go to the jury on the question whether the plaintiff took the note for value and without notice of the fraud.' As heretofore stated, when fraud is proved, or there is evidence tending to establish it, the burden is on the plaintiff to show he is a bona fide purchaser for value, before maturity, and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for plaintiff; the burden in such case having been clearly rebutted. But the issue itself, and the credibility of material relevant to the inquiry, is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury."

See Decision No. 1134.

Bills and Notes: Holder in Due Course: Burden of Proof.

The Cole Banking Company sued C. G. Sinclair and one Hensel upon a promissory note executed by Hensel to Sinclair and indorsed by Sinclair and delivered to the plaintiff banking company. From the judgment in favor of the plaintiff, defendant Hensel appealed. Hensel admitted the execution of the note, but stated that he executed this note to Sinclair, who was an agent of an insurance company, for a premium upon a life insurance policy, that it was agreed at the time that Hensel was to pay the note by services as a physician in examining applicants for insurance in the company, in which he had the policy. Sinclair and Hensel learned later that the company had no business to give Hensel, and it was agreed that the note should be cancelled. The banking company contended that it was an innocent holder for value, having acquired the note before its maturity and without notice of the failure of consideration. Hensel appealed particularly on the ground that the burden of proof was upon the banking company to show that it was a holder without notice. The Negotiable Instruments Law, in effect in the State of Utah, provides that every holder is deemed prima facie to be a holder in due course;

Digitized by Google

but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person, under whom he claims, acquired the instrument in due course. By another section the act provides that the title is defective when the signature of any party is obtained by fraud, duress or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to fraud. The court held that failure of consideration was not the same as illegal consideration, that under this provision of the statute the title of the plaintiff was not defective, and that the burden of proof was upon the defendant to show that the holder had notice of the failure of consideration.

The court said in part:

"By section 1604, Comp. Laws 1907, 'a holder in due course' is defined. Section 1611 provides that 'every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title in due course.' By section 1607 it is provided that 'the title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.' By section 1609, that 'a holder in due course holds the instrument free from any defect of title of prior parties free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.' The defense pleaded was not illegal, but mere partial failure of consideration. Failure or want of consideration does not constitute a defective title within the meaning of the foregoing provisions. 1 Daniels, Neg. Inst., §§ 814, 817. In the treatise of Easton & Gilbert on Commercial Paper and the Negotiable Instruments Law, at section 79, in discussing the statutory provision corresponding to section 1611 of our statute, it is said by the authors: 'In the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a bona fide holder for value, and this presumption is not repelled merely by proof that the bill or note, as between the immediate parties, was without consideration, and was made, indorsed, or accepted by one for the sole accommodation of the other. When no other proof is given, the holder is not bound to prove a valuable consideration. . . . It will be noticed that the statute provides that proof of a defective title shifts the burden of proof upon the holder. A title is defective where the instrument is obtained for an illegal consideration. It follows, therefore, that if the consideration be shown to be illegal, as for a gambling debt, an unlawful sale of commodities, or as being tainted with usury, the burden of proof will then rest upon the plaintiff to show that he was a holder in due course; but proof of a want or failure of consideration does not in most jurisdictions operate to

Digitized by Google

shift the burden by the authors to the effect that the indorsee, in an action by him against the maker, cannot be called on to prove consideration until the defendant has shown that the note was obtained or put in circulation by fraud or undue means, and that proof of want or failure of consideration between a maker and a payee of a promissory note does not change the presumption that one to whom the latter has indorsed and delivered the note is a bona fide holder for value, but the burden of proof is upon the maker.

"No facts are pleaded showing that 'the instrument, or any signature thereto' was obtained by 'fraud, duress, or force and fear, or other unlawful means or for an illegal consideration,' or that the note was negotiated 'in breach of faith, or under such circumstances as amount to a fraud.' From plaintiff's possession as indorsee and production of the note the statute deemed it prima facie to be a holder in due course. By other provisions of the statute (section 1576) it is also presumed that every negotiable instrument was issued for a valuable consideration, and that every person whose signature appears thereon became a party thereto for value. The question of defective title was not an issue raised in the case, nor was any evidence introduced in support of such an issue. The evidence introduced by way of defense was merely in respect of failure of consideration. As to such matters the burden was upon the defendant to establish it, and to show notice to the plaintiff. While the defendant gave evidence tending to establish the facts alleged in his answer with respect to the alleged promise made to him by Sinclair, he gave no evidence that the plaintiff, prior to the purchase of the note, had notice thereof.

"Having reached this conclusion, it is wholly unnecessary to consider the assignment with respect to the question of the competency of other evidence which was introduced by the plaintiff for the purpose of showing that it was a holder in due course, and that it purchased the note in good faith for value, and without notice of the defendant's alleged defense. The provision of the statute that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value, and every holder deemed prima facie to be a holder in due course (except when shown that the title of any person who negotiated the instrument was defective, which was not alleged not shown) were alone sufficient to authorize the findings made by the court on these matters."

See Decision No. 1135.

Bills and Notes: Failure of Consideration: Bona Fide Holder.

The plaintiff in this action, the City National Bank of Columbus, acquired the note in suit from McLaughlin Brothers, the payees named in the note by their indorsement. The makers are one Jordan and others, who purchased of McLaughlin Brothers a horse which McLaughlin Brothers had warranted for certain purposes. The warranty failed and the makers of the note sought to rescind the contract. The bank sued the makers and recovered a judgment, which

Digitized by Google

judgment was reversed upon appeal. Of course, one part of the defense was the false representations made by the payees of the note to the makers as to the qualities of this horse. The plaintiff contended that in order for each defendant to avail himself of this defense of false representations, he would have to show that the false representations were made to him individually. The court held, however, that if the false representations had been made to one, it would inure to the benefit of all, for the reason that they were joint makers of the note and the note was executed for one consideration. It was further contended by the plaintiff that the good faith of the plaintiff was so conclusively established by the evidence that the court should direct a verdict in favor of the plaintiff. The Appellate Court held, however, the question of good faith was one for the jury.

The court said in part:

"Relying upon the rule applied in Morton v. Morton, 10 Iowa, 58, that, if a defense jointly pleaded by several defendants is insufficient as to one of them, it is insufficient as to all; the appellee contends that the failure of defendants to prove that the alleged false representations were made to each individual leaves the defense based thereon without any support. This argument involves a misconception of the effect or at least the extent of the rule. The Morton Case presents an instance in which one of the defendants being a married woman her co-defendants, who were under no disability, sought to plead and obtain the benefits of her coverture. The decision there announced goes no further than to say that a defense which is personal to one defendant, like coverture or minority, or other lack of capacity to contract, is not available to his co-defendants. With that conclusion we have now no quarrel. But, where the preferred defense goes to the merits of the case or to the substance of the contract sued upon, it may be pleaded by all of the defendants, or, if pleaded by one of them, it inures to the benefit of all. This distinction was expressly recognized in the case of Morrison v. Stoner, 7 Iowa, 493. See, also, Hall v. Rochester, 3 Cow. (N. Y.) 374; Morton v. Crogham, 20 Johns. (N. Y.) 122; Blodget v. Morris, 14 N. Y. 491; Harrison v. Wallton, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Miller v. Longacre, 26 Ohio St. 291; Campbell v. McHarg, 9 Iowa, 354. In Hall v. Rochester, supra, a case cited approvingly by this court in Morrison v. Stoner, the action was upon a promissory note, and the defense advanced by one defendant that the note had been procured by fraud was held to inure to the benefit of all of the makers, including those who had suffered default to be taken against them. It is argued, however, if we understand counsel correctly, that the defendants were not joint purchasers of the horse, but separate and independent purchasers of distinct shares therein, and that in such case a good defnese as to one purchaser may not be good as to others. The evidence as to the scheme of plan of the purchase is not very clear, but it is certain that the note is a joint contract, on which all are liable either as principal makers or as sureties for their co-makers, and, if such be the case, a defense which goes to the plaintiff's right of recovery in whole or in part may be shown whether the plea be

Digitized by Google

made jointly or severally. Morrison v. Stoner, supra. It is a general rule that the liability of a surety is not greater than that of his principal. And he may have the benefit of any defense which the principal pleads or could plead, subject, of course, to the limitation recognized in the class of cases of which Morton v. Morton, supra, is a type. Henline v. Reese, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 736; Eising v. Andrews, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75. Applying this rule in an action upon a promissory note, it has been held that the surety may show failure of consideration for the note, and may show that the note was tainted with fraud in its inception, and that the sale for which it was given has been rescinded. Stockton v. Giddings, 96 Cal. 84, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181. 'Fraud and deceit in inducing the principal to make his promise will release the surety, as these affect the character of the debt.' Winn v. Sanford, 145 Mass. 302, 14 N. E. 119, 1 Am. St. Rep. 461; Ohio T. E. Co. v. Hensel, 9 Ind. App. 328, 36 N. E. 716. We do not, however, concede that the defendants were not joint purchasers of the horse. They seem to have united in a somewhat informal association for the purpose of making the purchase. The seller was not offering or proposing to sell any share or interest in the horse except on condition that enough purchasers were found to take the entire ownership. When the required number was found, the entire title was transferred, and all the purchasers united in making the note; and, while as between themselves it was doubtless understood that each owned a share or fractional interest in the horse, such fact is not inconsistent with the theory of joint purchase. The technical legal effect of the transaction, whether it served to make the defendants joint purchasers, or partners, or principals as to their several fractional shares of the price and sureties as to the remainder, is in our judgment a question unnecessary to decide. In either case we think that false representations operating to induce the purchase, though not made directly to each and every individual purchaser, would afford good ground for a rescission of the purchase, and that proof of such rescission would constitute a good defense to an action on the note in the hands of any person charged with notice of the fraud.

"It is finally insisted that the good faith character of plaintiff's ownership of the note is to be conclusively presumed, or that it was so clearly established by the evidence that the court could not do otherwise than direct a verdict against the appellants. We feel constrained to hold that it was a question for the jury. As we have already said, there was evidence for the jury upon the question whether the note was procured by false representations. If this question should be determined in the affirmative (and there was evidence from which the jury could so find), then the instrument was tainted with fraud in its inception, and the presumption of good faith which ordinarily attaches to the purchase of negotiable paper before due no longer obtains, and the burden would in such case be upon the plaintiff to show that it received the paper in due course and without notice of the defense. See McKnight v. Parsons, (Iowa) 113 N. W. 858, and cases there cited. On the record before us we are not prepared to say that the showing is sufficiently conclusive to require us to hold that the appellee's good faith ownership of the note has been established

Digitized by Google

as a matter of law. It follows from the foregoing that a verdict should not have been directed, and a new trial must, therefore, be ordered."

See Decision No. 1136.

UNITED STATES EXCHANGE BANK v. ZIMMERMAN.

(Supreme Court, Appellate Term. November 24, 1908.)

113 N. Y. S. 33.

BILLS AND NOTES — INDORSEMENT — NOTICE — PARTNERSHIP — SECURITIES — DISCHARGE OF INDIVIDUAL CLAIMS — FRAUD PRESUMPTION — NOTES — RECEIPT FOR INDIVIDUAL CLAIM — REMEDY.

1. That the maker of a note gave as collateral a note indorsed by him and by a firm of which he was a partner charged the payee to inquire whether the maker rightfully indorsed the firm name; that the note secured was discounted for the maker individually raising the presumption that it was not a partnership affair.

2. The unexplained fact that a partnership security has been received from a partner to discharge an individual claim against him shows fraud, which the recipient must rebut by showing either that the partner acted with authority, or that he had good reason to believe so.

3. One taking a partnership note from one of the members for the member's individual debt without consulting or apprising the other members of his intention or obtaining their consent has recourse against the member only.

Appeal from Municipal Court, Borough of Manhattan, Eighth District.

Action by the United States Exchange Bank against Frank W. Zimmerman, impleaded. From the judgment, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and MacLEAN and SEABURY, JJ.

Dutton & Kilsheimer, for appellant. Hitchings & Palliser (Lynn W. Thompson, of counsel), for respondent.

MacLEAN, J. For half a year or so the plaintiff had dealings with one Gerber, discounting his paper, including notes signed by one Von Driesch and indorsed with the names of Gerber and Zimmerman and Frederick A. Gerber, and taking collateral he offered. It had no dealings with Zimmerman or with the firm of architects composed of and styled Gerber & Zimmerman. Zimmerman did not know of the bank's existence. A note of Gerber for $500 falling due August 20, 1906, the bank took from him $100 and a new note for $400, with as collateral some shares of Hudson Company Ice stock and a note for $400 drawn by one Miller to the order of Henry Soltong, and indorsed by Soltong and also indorsed by Gerber with the names of Gerber and Zimmerman and Frederick A. Gerber. Substituting $500 for $400, and setting back the date to June 20th, this was substantially a repeti-

Digitized by Google

tion of the transaction had on the bank's taking the note which fell due August 20th. The circumstances were sufficient to put the bank's officials to inquire whether Gerber, getting a discount for himself, were rightfully or wrongfully indorsing the name of the firm, were acting in the firm's business and creating an obligation of the firm.

The fact testified to by the cashier and by the former vice-president of the bank, that the note to which this was collateral was discounted for Gerber, raised the presumption that it was not an affair of the partnership. "The transaction indicated that the money was for Gilson's [Gerber's] use, and not raised on the partnership account." Lord Kenyon in Arden v. Sharpe and Gilson, 2 Esp. 524. This is an old citation, but its force is of the law of this State as uniformly held since Livingston v. Hastie, 2 Caines, 246, in 1804. It is now established that the unexplained fact that a partnership security has been received in discharge of a separate claim against himself is a badge of fraud which it is incumbent on the party who takes the security to remove by showing either that the party from whom he received it acted with the authority of his partners or that he himself had good reason to believe so. The omission to make an inquiry so customary, so perfunctory, exhibits heedlessness or a purpose not to scrutinize, perhaps expectation that the signature of one partner would cause the other to see it through, as sometimes forged paper is the better security for a loan. It happens also that Gerber had no right to sign "Gerber and Zimmerman" to anything at the time, for the partnership had ceased seven weeks previously by dissolution. For retrospective lights, it may be noted that the bank returned the ice stock and other collateral to Gerber before the trial, and that neither Gerber nor Sontong was served with a summons. "When any one takes a partnership note from one of the company for what he knows to be his particular debt, without consulting or apprising the other members of his intention or obtaining their consent, there is no hardship in confining his remedy to the one whose debt it is." The judgment against Zimmerman should be reversed.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE, P. J., concurs. SEABURY, J., concurs in result.

BACIGALUPO v. PARRILLI.

(Supreme Court, Appellate Term. November 24, 1908.)

112 N. Y. S. 1040.

BILLS AND NOTES — CHECKS — NON-PAYMENT — NOTICE OF DISHONOR.

Under the Negotiable Instruments Law (Laws 1897, p. 739, c. 612, § 160), requiring notice of dishonor to the drawer of a negotiable paper, a drawer of a check on a bank in which he had sufficient funds is discharged from liability on the failure of the person receiving the check to give notice of its dishonor on the bank refusing to pay because it was short of funds.

Appeal from Municipal Court, Borough of Manhattan, Second District.

Digitized by Google

Action by Charles Bacigalupo against Vito Parrilli. From a judgment of the Municipal Court in favor of plaintiff, defendant appeals. Reversed, and complaint dismissed.

Argued before GILDERSLEEVE, P. J., and MacLEAN and SEABURY, JJ.

Campora & Thiery (Aguste M. Thiery, of counsel), for appellant. Albert W. Duckworth, for respondent.

SEABURY, J. This action is upon a check drawn by the defendant and by him delivered to the plaintiff. The check was drawn upon "Banca P. Caponigri," and was delivered to the plaintiff on January 10, 1908. On Saturday, January 11, 1908, the plaintiff presented the check at the bank of Caponigri, and was told by the cashier of the bank that Caponigri was not in, that "he made a kind of deposit this morning, and we are kind of short of funds." The cashier further told the plaintiff that "you can come here Monday morning, and we will cash the check." To this information, the plaintiff replied "All right," and returned on Monday, January 13th, and demanded the payment of the check, and was informed that Caponigri had no money and could not pay the check. It is undisputed that at the time the check was given to the plaintiff the defendant had on deposit with Caponigri a sufficient sum to pay the check, and that he did not withdraw this sum. It is also admitted that Caponigri is insolvent. Under the circumstances disclosed, the loss for the amount of the check must fall upon the plaintiff, and not upon the defendant. After the plaintiff presented the check on January 11th, and payment was refused and he was told that the banker was "kind of short of funds," it was his duty to notify the defendant that payment had been refused if he wished to hold the latter upon the check. Upon the non-payment of the check, the drawer was entitled to notice of that fact, and, in the absence of such notice, was discharged from liability, section 160 of the Negotiable Instruments Law (Laws 1897, p. 739, c. 612); 5 Cyc. 539. If the drawer had been promptly notified of the refusal of the banker to pay the check, he might have been able to have taken action to secure the amount deposited with the banker.

The judgment appealed from is reversed, and the complaint dismissed, with costs in this court and the court below. All concur.

SYKES et al. v. CITIZENS' NATIONAL BANK OF DES MOINES, IOWA.

(Supreme Court of Kansas. November 7, 1908.)

98 Pac. 206.

BILLS AND NOTES — NEGOTIABILITY — WHAT LAW GOVERNS — COMMON LAW — EVIDENCE — LAW OF OTHER STATE — DETERMINATION — PRESUMPTIONS — ACTIONS — SUFFICIENCY.

1. In the absence of stipulations evincing a different intention, the negotiable quality of a promissory note made in Kansas and payable in Missouri will be determined by the law of Missouri.

Digitized by Google

2. The common law of another State, governing commercial transactions in issue in the courts of this State, is to be determined as a fact, upon pleadings and proof. In the absence of such proof it will be presumed that it is the same as our own.

3. The evidence is examined, and is found to be insufficient to support the finding of the District Court that the note in suit was, by the law of Missouri, negotiable.

(Syllabus by the Court.)

Error from District Court, Wyandotte County; J. McCabe Moore, Judge.

Action on a note by the Citizens' National Bank of Des Moines, Iowa, against R. A. Sykes and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

S. S. Ashbaugh and A. E. Helm, for plaintiffs in error. Stewart Taylor and J. D. McCue, for defendant in error.

BENSON, J. A judgment for the bank in this action was reversed on a former hearing in this court. Sykes v. Bank, 69 Kan. 134, 76 Pac. 393. On the second trial, in addition to the facts stated in the former opinion, the court found that the office of the payees, where the note was made payable, was in Missouri, and that by the law of that State the note is, and was, negotiable. By reason of the recitals in the note making the time of payment uncertain, it was held to be non-negotiable by this court. The trial court, after an amendment of the petition, having found the additional facts above stated, again rendered judgment for the plaintiff. The defendant now asks for reversal, upon the grounds, first, that the former decision of this court that the note is non-negotiable is a final adjudication of that matter; and, second, that the finding of the District Court relative to the law of Missouri is not sustained by the evidence. This note was made in Kansas, by residents of this State, and was payable, as the evidence now shows, in Missouri. It was indorsed by the payees, before maturity, to the Union Brokerage Company of Kansas, and was indorsed by that company, in Kansas, to the plaintiff, a national bank of Iowa. The makers had no knowledge or notice of these transfers, and paid the note before maturity to the payees, who had no authority from the holder to receive such payment. Upon these facts alone the judgment should be for the defendant, of we follow the former decision that the note was non-negotiable. It is claimed by the plaintiff, however, that the additional findings that the note was payable in Missouri, and that it is a negotiable instrument, warrant the judgment for the plaintiff. The new issue, presented upon an amendment allowed by the District Court in its discretion, had not before been adjudicated, and was properly tried. Therefore the first ground urged for reversal cannot be sustained. Subject to qualifications not necessary now to consider, the law of the place of performance of contracts governs in determining the liability of the contracting parties, and this principle applies to promissory notes. Randolph on Com. Paper, § 31; 2 Parsons on Notes and Bills 324; Daniels on Neg. Inst., § 879. "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters

Digitized by Google

respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought." Scudder v. Union National Bank, 91 U. S. 406, 412, 23 L. Ed. 245. We conclude that the negotiable character of this note must be determined by the laws of Missouri, where it was made payable. The question how this law is to be determined has been elaborately argued. Two views have been taken, both well supported by precedents. The federal court and the courts of New York, Iowa, Maine and Georgia have held that, as the law to be applied is the general commercial law or law merchant, it must be sought for, not in the decisions of local tribunals, but in the general doctrines of commercial jurisprudence; that, while the following decisions of the courts of final resort of the State where the note is payable in the construction of its statutes, the courts of the State where the case is tried will be governed by their own precedents in expounding the general common law applicable to commercial transactions. Oates v. National Bank, 100 U. S. 239, 25 L. Ed. 580; St. N. Bank v. Bank, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241; Roads v. Webb, 91 Me. 406, 40 Atl. 128, 64 Am. St. Rep. 246; Franklin v. Twogood, 25 Iowa, 520, 96 Am. Dec. 73; National Bank of Michigan v. Green, 33 Iowa, 140; Pattillo v. Alexander, 105 Ga. 482, 30 S. E. 644. Nothwithstanding the weight of the foregoing decisions, and the strength of the argument in their support, the rule adopted in a large majority of the State courts, and announced by text-writers, is that when it becomes necessary to determine the common law of another State, the decisions of the courts of final resort of that State will be followed, regarless of precedents to the contrary in the State where the trial is held, and that this rule applies to the law merchant, as well as to other branches of the common law. This rule is based upon the presumption that the parties have contracted with reference to the law of the place of payment, and that law is applied in accordance with the doctrine of comity. This rule has been approved in this court in its application to other subjects, but it does not appear to have been directly invoked with respect to commercial paper. St. L. & S. F. Ry. Co. v. Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Alexander v. Barker, 64 Kan. 396, 67 Pac. 829; Railroad C. v. Johnson, 74 Kan. 83, 86 Pac. 156. The opinion in Loan Co. v. Solomon, 71 Kan. 185, 79 Pac. 1077, clearly states the principle upon which contracts solvable by the laws of another State are enforced here.

Following the rule generally prevailing, we should now hold the note in question to be a negotiable instrument, if the law of Missouri is as the District Court found it to be. That finding, however, is challenged, upon the ground that it is not supported by the evidence; and, as the evidence consists of the statutes of Missouri, and decisions of courts of that State, pleaded as facts, the sufficiency of the proof to sustain the finding is fairly presented for review here. Belknap v. Sleeth, 77 Kan. 164, 93 Pac. 580. The statute pleaded and read in evidence is as follows: "Every promissory note for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the effect and be negotiable in like manner as inland bills of exchange." Section 733, Rev. St. Mo. 1889. The decision of the Supreme Court of Missouri, a part of

Digitized by Google

which was set out in the petition, and all of which was read in evidence, is the opinion of Stillwell v. Craig et al., 58 Mo. 24. The action was upon a promissory note "payable in instalments not to exceed ten per cent. on each share (of the stock for which it was given), at thirty days' notice of call from the board of directors." The opinion says: "Our statutory requisites for negotiable paper are fully met in this instrument. . . . But the defendants insist that it lacks, in two particulars, the certainty essential to make it a promissory note, viz., as to amount, and as to time of payment. . . . As to time of payment, the law is less exacting. . . . Contingencies in this particular must be exceedingly remote, in order to vitiate the paper for negotiable capacity. In Washington County Mut. Ins. Co. v. Miller, 26 Vt. 77, a note for twenty-one dollars, payable 'in such portions and at such time or times as the said company may, agreeably to their act of incorporation, require,' was held to be a promissory note for the sum specified, so as to determine a question of jurisdiction, but a doubt was expressed whether it would be such in a commercial sense. The doubt, however, as it seems to me, is not justified by the reasoning of the opinion, or by the authorities which it cites. In President, Directors, etc., v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273, a similar instrument was held to be a good promissory note, as being 'payable in money, and payable absolutely, and not depending on any contingency.' In the element of certainty as to time of payment I can preceive no difference in principle between such a note and one payable on demand. Hence, if the note under consideration be transferable at all, I have no hesitation in saying that it is negotiable, at least to the extent of authorizing a suit jointly against makers and indorsers." Pages 30, 31, of 58 Mo. The clause in the note in question here, upon which it was held by this court in the former decision to be non-negotiable, was this: "The makers and indorsers hereof hereby severally waive protest demand and notice of protest and non-payment in case this note is not paid at maturity and agree to all extensions and partial payments before or after maturity, without prejudice to holder." In the opinion in Bank v. Gunter, 67 Kan. 227, 72 Pac. 842, the precedent followed in the former decision of this case, it was said: "In the note in question payment is first fixed at 182 days after the date, but, as will be observed, a later provision makes the time indefinite by stipulating that it may be changed and extended either before or after maturity. If the time is to remain fixed until maturity, when another time is to be fixed by the parties, or if payment is made to depend upon events which necessarily must occur, and the time of payment is ultimately certain, other considerations would arise; but here payment is not ultimately certain, for the time named in the paper is subject to change at any time, at the volition of some of the parties to the paper." Page 231 of 67 Kan., page 843 of 72 Pac. In Stillwell v. Craig, supra, the note was payable in instalments which would not affect its negotiability (Daniel on Neg. Inst., § 48), and these instalments were to be paid in thirty days after a call by the board of directors of the payee; that is, in thirty days after demand. As was said of a like provision: "It was in effect payable on demand or in instalments on demand." White v. Smith, 77 Ill. 351, 353, 20 Am. Rep. 251.

Digitized by Google

The language of the Supreme Court of Missouri, quoted above, "I can perceive no difference in principle between such a note and one payable on demand," is significant, showing the interpretation placed upon the language of that instrument, holding it to be, in effect, a demand note. The language of the note in this case will not bear that interpretation, and the opinion in Stillwell v. Craig et al., supra, does not, in our view, sustain the finding of fact in this case with respect to the law of Missouri. It is true that it may indicate a trend in that direction, but this is not sufficient to prove the fact pleaded. The same court in a recent case, in considering the effect of a decision of a sister state when offered in evidence to prove the common law of that state, said: "A close analysis of the Arkansas cases cited leads us to conclude that the Supreme Court of Arkansas never went so far as appellant contends. The very most that can be said was that that learned court was 'heading' in that direction. But as seen by our own decisions, and pointed out in Grattis v. Railroad, supra (153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721), courts do not always go on the way they are headed, and it is not always safe to say that a court will reach a goal to which its face is turned and its steps directed. Indeed we may allow to the Supreme Court of Arkansas the same right and disposition to establish a growth in the law, or reconstruct its views, that we arrogate to ourselves." Root v. K. C. S. Ry. Co., 195 Mo. 348, 372, 92 S. W. 621, 629, 6 L. R. A. (N. S.) 212. The decision of the Kansas City Court of Appeals in City National Bank v. Goodloe-McClelland Com. Co., 93 Mo. App. 123, fully sustains the finding, but that is an intermediate court, and its decisions do not settle the law of that State. Its jurisdiction is limited, both in territory and amount in controversy, and its decisions involving an amount in excess of $2,500 are subject to review in the Supreme Court. We have the highest respect for that tribunal. The great learning and ability of its judges is unquestioned; but we cannot admit its opinions to determine that the common law of that State, as a fact, is different from what we have declared the common law to be here. "The decision of the Kansas City Court of Appeals in City of Goodland v. Bank, 74 Mo. App. 365, is alone cited in support of this contention. A fixed and settled rule of decision in a State Court of last resort establishes the law of the State in such manner as to bind the federal courts in all matters controlled by the State law; but the opinions of intermediate Appellate Courts, like the Kansas City Court of Appeals, while entitled to great respect and regarded as persuasive authority, are not controlling upon the federal courts, because they do not settle the law of the State." Anglo-American Land, M. & A. Co. v. Lombard, 132 Fed. 721, 741, 68 C. C. A. 89, 109. See also Hennessy v. Bavarian Brewing Company, 145 Mo. 104, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 544. Other Missouri decisions read in evidence related to the effect of the mortgage security, and do not govern this question. The statute quoted above (Rev. St. Mo. 1889, § 733) is probably only declaratory of the common law (First Nat. Bank of St. Charles v. Payne, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520), and does not materially differ from our own.

Upon a careful examination of the evidence offered upon the sub-

Digitized by Google

ject we conclude that the finding that the note sued upon was and is negotiable is not supported by the proof. In the absence of such proof it will be presumed that the law of Missouri is the same as our own.

The judgment is reversed, and the cause remanded for further proceedings. All the justices concur.

BUZZELL v. TOBIN.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 7, 1909.)

86 N. E. 923.

BILLS AND NOTES — CHECKS — "HOLDER IN DUE COURSE" — ORIGINAL CIRCULATION.

1. An indorsee of a check for value and in good faith, before it was overdue and without notice of any infirmity or that payment had been stopped, was a "holder in due course," with all the rights appertaining thereto, under Rev. Laws, c. 73, § 69.

2. Rev. Laws, c. 73, § 33, provides that, where an instrument is in the hands of the holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed. Held, that where plaintiff was an indorsee of a check in due course, with all the rights appertaining to such title, it was no defense against him that the check had been unlawfully put in circulation by defendant's clerk without authority.

Exceptions from Superior Court, Suffolk county.

Action by Eugen A. Buzzell against James W. Tobin. Judgment for plaintiff, and defendant brings exceptions. Overruled.

Keating & Brackett, for plaintiff. W. B. Grant and H. E. Whittemore, for defendant.

BRALEY, J. If the consideration of the check as between the defendant and the payee was the price of a pair of horses, which might have been found to have been unsound at the time of sale, yet the plaintiff as indorsee having taken it for value, and in good faith before it was overdue, and without notice of any infirmity, or that payment had been stopped at the bank, became a holder in due course, with all the rights appertaining to such a title. Rev. Laws, c. 73, § 69; Wheeler v. Guild, 20 Pick. 545, 552, 553, 32 Am. Dec. 231; Shawmut National Bank v. Manson, 168 Mass. 425, 47 N. E. 196; Massachusetts National Bank v. Snow, 187 Mass. 159, 72 N. E. 959. The defendant, while not expressly conceding this, rests his defense solely on the ground that, because his clerk had no express authority to deliver the check to the payee, it was unlawfully put in circulation, and the contract being incomplete, no title passed to the plaintiff by its subsequent negotiation. Fearing v. Clark, 16 Gray, 74, 77 Am. Dec. 394; Hill v. Hall, 191 Mass. 253, 265, 77 N. E. 831. But the check was in the hands of the plaintiff as a holder in due course, and as to him a valid delivery by the defendant was

Digitized by Google

conclusively presumed, even if this defense would have been open as between the original parties. Rev. Laws, c. 73, § 33; Massachusetts National Bank v. Snow, 187 Mass. 159, 163, 72 N. E. 959. We are, therefore, not called upon to decide whether there was other evidence upon which, under suitable instructions, the jury could have found either actual or constructive delivery. It accordingly follows that the ruling requested could not properly have been given, and the case was rightly submitted to the jury.

Exceptions overruled.

HARLOW et al. v. PARSONS LUMBER & HARDWARE CO.

(Supreme Court of Errors of Connecticut. Jan. 22, 1909.)

71 Atl. 734.

FRAUDS, STATUTE OF — AGREEMENTS FOR SALE OF PERSONALTY — EVIDENCE — PAROL TESTIMONY — MEANING OF TECHNICAL TERMS — SALES — SALES SLIPS — CONSTRUCTION — TECHNICAL TERMS — DELIVERY — WHEN TO BE MADE — TIME FOR MAKING — REASONABLE TIME — ACTION FOR PRICE — JURY QUESTION — TIME — REASONABLENESS — EVIDENCE — APPEAL AND ERROR — REVIEW — PRESUMPTIONS — HARMLESS ERROR — ADMISSION OF EVIDENCE.

1. An agreement for a sale of lumber for more than $50 to be thereafter delivered, no part of which was ever accepted, was within the statute of frauds (Gen. Stat. 1902, § 1090), and could be proved in an action for the price only by a memorandum of the agreement in writing, signed by the buyer or its agents.

2. Parol evidence was admissible in an action for the price of lumber to show the technical meaning of the words, "when transit car," on the sale slip.

3. The words, "when transit car," on a sales slip covering a sale of a car load of lumber, did not fix any date of delivery; and did not show that delivery should be made on arrival of the car.

4. Where parties to a contract of sale do not agree upon the date of delivery, the law implies that it is to be made within a reasonable time.

5. Ordinarily what is a reasonable time for delivery of goods sold is a question of fact; but, when the circumstances are such that but one conclusion is reasonably possible, the court may assume or declare to the jury that conclusion.

6. In an action for the price of rejected lumber, whether the lumber was delivered within a reasonable time held, under the evidence, a jury question.

7. Delay of the carrier in transporting goods is an important circumstance to be considered in determining whether delivery was made within a reasonable time.

8. On appeal in an action for the price of rejected lumber, successfully defended on the ground of failure to deliver within a reasonable time, it will be presumed that the trial court considered the carrier's delay in transporting the lumber in determining that it was not tendered within a reasonable time.

9. Any error in admitting evidence under one defense was harmless where the case was not decided on that defense.

Appeal from City Court of Hartford, Herbert S. Ballard, Judge.

Action by Frederick M. Harlow and others against the Parsons Lumber & Hardware Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

Digitized by Google

The plaintiffs, doing business in Hartford, and the defendant, doing business in Unionville, Conn., by telephone entered into a contract for the sale and purchase of a carload of lumber then in transit by rail from Laurel, Miss., to Wallingford, Conn. The plaintiffs thereupon caused a sales slip and invoice of the lumber to be made out, which read, respectively, as follows:

"Harlow, Todd & Co., Hartford, Conn. Wholesale Lumber. Order No. 1409. Date, May 15, 1906. Sold to the Parsons Lubr, & Hardware Co., at Unionville, Ct. Route: When transit car. Terms 1½% 15 days. One (1) car 1x4 (3¼" face) A Sap rift flg. D. & M. at $38.50. Thank you. Harlow Lumber Co., M. P. H."

"Harlow Lumber Co., Successor to Harlow, Todd & Co. Wholesale Lumber. Hartford, Conn., Apr. 17, 1906. Sou. Car. No. 40290. Consigned to us, Unionville, Ct. Order No. 1409. Terms, 1½% 15 ds. Sold to Parsons Lbr. & Hdw. Co., 18,072 ft. 1x4 "A" Sap Rift D. & M. at $38.50, $695.77."

These were mailed to and received by the defendant. Afterwards the defendant, the lumber not having arrived, and the plaintiffs being unable, after repeated inquiries, to give definite information as to when it would arrive, wrote the plaintiffs the following letter: "The Parsons Lumber & Hardware Co., Unionville, Conn., July 10th, 1906. Harlow, Todd & Co., Hartford, Conn. — Gentlemen: Please cancel the order for car No. 40290. We have had our agent here wire to Hartford River and have received word June 28th that there was no account of any such car there. We have been waiting a few days since to see if it would come but as it has not please cancel as before directed, as we will procure it somewhere else. Yours very truly, The Parsons Lumber & Hardware Co." The lumber arrived in Wallingford on the 13th of August, 1906, and the plaintiffs at once offered to forward it to the defendant at Unionville, but the defendant refused to accept it. The plaintiffs then sold the lumber for a less price than the defendant was to have paid. This action is brought to recover the difference.

Josiah H. Peck, for appellants. Joseph P. Tuttle, for appellee.

THAYER, J. The complaint alleges that on May 15, 1906, the plaintiffs and the defendant mutually agreed that the plaintiffs should sell to the defendant, and that the defendant should purchase from the plaintiffs, one carload of lumber, consisting of 18,072 feet of yellow pine flooring, for $38.50 per 1,000 feet, said lumber being then in transit and to be delivered by the plaintiffs to the defendant on arrival, and that on the 15th of August following, on the arrival of the lumber, the plaintiffs offered to deliver the same to the defendant, and the defendant refused to accept it. As the complaint thus alleges an agreement for the sale of personal property for upwards of fifty dollars to be thereafter delivered, no part of which was ever accepted, such agreement was within the statute of frauds, and could be proved only by a memorandum thereof in writing signed by the defendant or its agents. Gen. Stat. 1902, § 1090.

For such memorandum the plaintiffs relied upon the sales slip, invoice, and letter of the defendant which appear in the statement of the case. It nowhere in either of these documents expressly appears that the lumber was to be delivered on arrival or within what time

Digitized by Google

it was to be delivered. The sales slip is dated May 15th, the day the contract was made. The invoice is dated April 17th, nearly a month earlier. In the sales slip appear the words "When transit car." The plaintiff insists that these words express the date of delivery, and that such date is the arrival of the lumber in Unionville. Unless they have in the lumber trade a technical meaning different from their ordinary meaning, it is clear that they give no information as to the time when the lumber should be delivered. But the plaintiffs insisting in the trial below, as they insist here, that the words had such technical meaning, the court properly received parol evidence to show what that meaning is. Hatch v. Douglas, 48 Conn. 116, 128, 129, 40 Am. Rep. 154; Soper v. Tyler, 77 Conn. 104, 106, 58 Atl. 699. From such evidence the court found that such sales slips are customarily used in the lumber trade, and that it is the custom to fill in the blank after the printed word "when" with the date of shipment; but that, when filled as this was with the words "transit car," they mean that the lumber has left the mill and is in transit. The words, therefore, do not fix the date of delivery. If the parties to the contract did not agree upon the date of delivery, the law would imply that it was to be within a reasonable time. Soper v. Tyler, 73 Conn. 660, 661, 49 Atl. 18, 19. But this is not the contract alleged in the complaint, and the memorandum relied upon fails to prove the special contract alleged to deliver on arrival. The court correctly ruled, therefore, that the memorandum is not sufficient to prove the contract alleged.

If the memorandum is construed as requiring the delivery to be within a reasonable time, the plaintiffs claim that this is not "a question of primary fact," but a conclusion which is, in such cases, a question of law. Ordinarily what is a reasonable time under the circumstances of a given case is a question of fact for the jury. When the circumstances are such that but one conclusion is reasonably possible, the court may assume or declare to the jury the conclusion which must inevitably be reached. Loomis v. Norman Printers' Supply Co., 81 Conn. 343, 71 Atl. 358. In the present case it was a question of fact to be determined under the evidence, and was so treated in the pleadings. In the case of Soper v. Tyler, 73 Conn. 660, 662, 49 Atl. 18, 19, it is said that "what was such reasonable time was a question of fact for the jury." In that case the question being considered was whether an order to ship grain was given within a reasonable time. In the present case the first defense of the answer set up in substance that the delivery was not tendered within a reasonable time, the plaintiffs joined issue on that question of fact, and the court has found the issues in favor of the defendant. There is nothing in the case as it comes before us from which we can see that the court adopted any wrong conclusions of law in making the determination. If, therefore, the plaintiffs proved a contract to deliver within a reasonable time, they failed to prove performance on their part.

One of the conclusions reached by the court was that the unexplained failure on the part of the railroad to transport the lumber promptly did not excuse the plaintiffs' failure to make delivery either within the usual time required for transportation or within a reasonable time. Whether it would excuse non-delivery within the

Digitized by Google

usual time of transportation it is unnecessary to consider, as that is not a question in this case. Such a delay would be an important circumstance to be considered in determining whether the delivery was made within a reasonable time. Delays of that character will, in the ordinary course of things, occur and are to be considered in determining the reasonableness or unreasonableness of a party's conduct. We must assume that the court took into consideration the fact of the railroad's lack of promptness in arriving at the conclusion that the lumber was not tendered to the defendant within a reasonable time. It cannot be said, therefore, that the court was wrong in the conclusion mentioned.

Two witnesses called by the defendant were asked to relate what they heard of a telephone conversation between the parties to the suit at the time the contract was made. Their answers tended to show an agreement on the part of the plaintiffs to deliver the lumber in ten days or two weeks, and was admissible in support of the allegations of the second defense upon which issues of fact were joined. The evidence was objected to as tending to vary the terms of the written memorandum. The objection was overruled, upon what ground is not stated. As the case was decided upon the ground that the memorandum did not support the contract alleged in the complaint, and that the lumber was not tendered within a reasonable time, and was not decided upon the grounds stated in the second defense, the plaintiff can have received no harm from the reception of the evidence, and the ruling of the court in admitting it affords no ground for a new trial.

There is no error. The other judges concur.

Digitized by Google

Digitized by Google

Commercial Paper: Forgery: Negligence of Maker.

In our October number for 1907, page 12a, we discussed the case of The National Exchange Bank of Albany v. Lester, a decision of the Appellate Division of the Supreme Court of the State of New York, Third Department. (Decision No. 999.) That case held that where blanks in a negotiable paper were negligently left unfilled so that fraud in raising the amount is invited, the one who invites the fraud must stand the loss. In the case under discussion the plaintiff was a holder in due course, the defendant, an accommodation indorser. At the time of the indorsement the note in question was for seventy-five dollars. A blank space had been left before the words "seventy-five" and subsequently the words "three hundred" were filled in, so that the note as raised read for $375. The indorser was held liable for the full amount. On March 5th, 1909, the Court of Appeals reversed this decision in an exhaustive opinion written by Justice Willard Bartlett and concurred in by the entire court. 87 N. E. Rep. 779. The court drew a distinction between the two classes of cases in which blanks are filled in subsequently to the execution of the instrument:

(1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both.

Digitized by Google

It is with the latter class of cases alone that we shall deal here. The former will be treated in the succeeding editorial note in discussing the case of People v. Gorham. In this latter class, i. e., where an apparently complete instrument has been fraudulently raised, many courts have held the maker or indorser liable for the amount as raised if there has been negligence in leaving blanks on the ground that he is estopped by his negligence and that when one of two innocent parties must suffer, he who first put the machinery which caused the loss into operation must bear the loss. On the other hand many other jurisdictions take the opposite ground, holding that a man is not liable for all results of his negligence, but only for those results which could be reasonably anticipated by a reasonable man, and that the commission of the crime of forgery is not the natural result to be anticipated from the leaving of a blank in a commercial instrument. In the case under discussion New York after reviewing the authorities stands squarely with the latter view so that in New York a maker or indorser though negligent is not liable for the raised amount if the instrument has been fraudulently raised after execution. Agreeing with the New York doctrine are the following jurisdictions: Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas, and South Dakota; while opposed are: Kentucky, Pennsylvania, Louisiana, Illinois and Missouri. The opinion in the New York case contains citations of the cases in each of the above jurisdictions.

There are weighty reasons for each of these views, but taking into account the purpose of the Negotiable Instruments Law — to increase the negotiability of paper — and also the well-settled rule of law and common sense that of two innocent parties the one who put the machinery which caused the loss into operation must bear the loss; the New York court seems to have taken the less satisfactory view. The maker or indorser of a note can readily prevent any spaces being left blank — writing close up to the margin or drawing a line or two is all that is necessary — but subsequent holders have no such protection. Without any means of knowledge they must decide at their peril whether an instrument has been raised or not, while the prior party who by a stroke of his pen could have prevented the occurrence goes scott free. Aside from the justice of the case, it is evident that this rule will make banks and third parties more chary of commercial paper and hence impede its negotiability. The decision in question would therefore seem to be out of harmony with the spirit of the Negotiable Instruments Law and is to be regretted.

The court said in part:

"In support of the correctness of this ruling the learned counsel for respondent asserts the doctrine that 'a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled, facilitating an alteration raising the amount, is liable for the face

Digitized by Google

of the note as raised to an innocent holder for value,' and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska and Pennsylvania. In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only, because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures, or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to bona fide holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of implied authority, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein is placed upon the doctrine of negligence or estoppel by negligence. This court is not thus constrained. The question involved in the present appeal has not been authoritatively decided in this State, and we are at liberty to adopt that view of the law which seems to us most consonant with sound reason and best supported by well-considered adjudications in other jurisdictions. The outcome of these adjudications is accurately set forth, as it seems to me, by Mr. Randolph in his treatise on the law of commercial paper, as follows:

"'Where negotiable paper has been executed with the amount blank it is no defense against a bona fide holder for value for the maker to show that his authority has been exceeded in filling such blank and a greater amount written than was intended. This was also once held to be the rule where no blank has been actually left, but the maker had negligently left a space either before or after the written amount, which made it easier for a holder to enlarge the sum first written. It has now, however, become in America an established rule that if the instrument was complete without blanks at the time of its delivery the fraudulent increase of the amount by taking advantage of a space left without such intention . . . will constitute a material alteration and operate to discharge the maker.' (1 Randolph on Commercial Paper, § 187.) The rule thus stated is sustained by the decision of the courts of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine and accords better with such adjudications of this court as bear more or less directly on the question involved. To sustain the judgment in the case at bar, in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised after indorsement by means of a forgery is liable upon the instrument in the hands of a bona fide holder for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this

Digitized by Google

would be to create a contract through the agency of negligence, for the action is not in tort for damages, but upon the contract as expressed in the note. But apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed and upon what seem to be considerations of sound reason, independent of judicial authority. An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodatiton of the maker and who complies with such request? It is a complete instrument in all respects — as to date, name of payee, time and place of payment and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument — in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. . That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this State, and I am not willing to sanction any such proposition, either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. (See Bradish v. Bliss, 35 Vt. 326.) As was said by Judge Cullen in Critten v. Chemical Nat. Bank (171 N. Y. 219, 224), it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case."

See Decision No. 1137.

Bills and Notes: Omitting Name of Payee: Effects as to Check.

A rather striking illustration of an "obvious" blank occurs in the case of People v. Gorham, decided November 14th, 1908, by the California Court of Appeals and reported in 99 Pac. 391, and also as Decision No. 1138 in this issue.

Digitized by Google

No. 9

Los Angeles Cal March 10 1908

Farmers & Merchants National Bank

PAY TO THE ORDER OF

Four hundred DOLLARS

$ 400

Mrs S. M. Dimmick

EDWARD V. BROKAW & BRO., 54 BROAD ST., N.Y.

Digitized by Google

In the case of People v. Gorham defendant had bought a piano in payment of which she presented a check similar to the one illustrated. She represented it as the check of her sister, Mrs. Dimmick. The seller of the piano at her request stamped his name in as payee after delivery to him of check by defendant. Mrs. Dimmick was not the sister of the defendant, had not given her the check, and had not four hundred dollars in the bank. Defendant was convicted of passing a forged check. She appealed on the ground that the instrument in question not being made out to any payee was not a check and hence that she had not passed a forged check. The court held that when she delivered the check, with the name of the payee blank, she gave transferee power to insert therein his name, that when the name was inserted it became a valid check, and that the filling in related back to the time of delivery. Therefore the instrument in question became a check from the time of delivery to the transferee.

See Decision No. 1138.

Digitized by Google

This was a criminal prosecution for forgery on this state of facts: The defendant, representing herself to be the sister of one Mrs. S. M. Dimmick, negotiated with the Wiley B. Allen Co. for the sale of a piano. She agreed to purchase one for $350, and presented as payment a check for $400, signed by Mrs. S. M. Dimmick, the name of the payee not being inserted. The salesman requested the defendant to write in the name of the company as payee, but she declined and told them to stamp it in, which they did. A copy of a similar check appears in this issue. It subsequently appeared that defendant was not the sister of Mrs. Dimmick, that Mrs. Dimmick had not signed the check and had not $400 in the bank. Defendant was indicted for uttering a forged check under section 476 of the California Penal Code and was convicted. An appeal was taken on the ground that the check did not contain the name of any payee, was not therefore a check, and that therefore there was a variance between the indictment which charged the utterance of a forged check and the proof. The question thus presented to the court was: Is the instrument in question a check?

The court said:

"It may be as contended by appellant, that the instrument did not constitute a check until the name of the payee was inserted therein, though the contrary doctrine seems to prevail in the State of Indiana. In any event, all that was required to make the instrument a check was the insertion therein of the name of the payee and the filling in of such blank may be made by any one authorized to do so. When so filled in it relates back to the time of its delivery. Such authority may be conferred under an implied agency created by the maker's act in putting the paper into circulation."

It will be seen that there are three questions raised in the opinion of the court:

(1) Can an instrument otherwise complete but from which the name of the payee has been omitted canstitute a check?

(2) Has one receiving such an instrument the authority to fill in the blank?

(3) As to what time does such filling-in take effect?

I. As to the first of these questions, there is as indicated in the portion of the opinion above cited, some difference of opinion. The question relates not to the note or check after the blank has been filled in but before such filling in. The tendency of section 6 of the Negotiable Instrument Act which is to the effect that the validity of a note is not impaired by reason of the omission of the value given, the date, the place of drawing, and the place of payment would seem to be against the validity of the instrument until the name is inserted. If the legislature had intended that its omission would have the same lack of effect as the omission of the date, etc., it would have said so. In addition, subdivision 6 of section 8 provides that "where

Digitized by Google

an instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty." It would seem then that under the Negotiable Instruments Law a check is not a check until the name of the payee is inserted unless of course it be made payable to bearer.

II. In general, however, when an instrument is delivered with any part not filled in — an "obvious" blank as the New York Court of Appeals calls it — authority is given to the transferee to fill it in. This is the holding of the case under discussion. The qualifications on this right are set forth in section 14 of the Negotiable Instruments Law which is as follows:

"Where the instrument is wanting in any material particular the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument after completion is negotiated to a holder in due course it is valid and effectual for all purposes in his hands and he may enforce it as if it had been filled up strictly in accordance with the authority given."

On this point see Mitchell v. Culver, 7 Cow. (N. Y.) 336, and Herman v. Gregory, 115 S. W. (Ky.) 809.

III. On the third question, the answer of the court in this case is that when the instrument is filled in, in accordance with the authority given, such filling in relates back and the instrument is considered as having been complete from the time of delivery. This is the universally accepted theory.

See Decision No. 1138.

Bills and Notes: Bona Fide Purchasers: Notice: Taking Note of Corporation in Payment of Personal Debt of Officer Executing Note.

It will be recalled that in the October, 1908 Quarterly, at page 43a, we discussed the case of Ward v. City Trust Co., 84 N. E. 585, in which the court held among other things that where an officer of a corporation indorses in his official capacity paper payable to the corporation and delivers the same in payment of his personal indebtedness, the form of the paper is notice to the one receiving the same that the officer of the corporation is using corporate property to pay his personal debt in apparent violation of its right, the effect of which

Digitized by Google

notice is to put the one taking the paper on inquiry to determine whether the officer of the corporation was authorized so to use its funds.

This question suggested itself to the Supreme Court of Wisconsin in the late case of Kip v. Smith, 118 N. W. 848, Decision No. 1139. It is true that the court expressly declined to pass thereon as the question had not been raised at the trial and was not necessary for the decision of the case at bar. A careful reading of the opinion, however, together with the authorities cited constrains one to the view that the Wisconsin courts will follow the rule laid down by New York in Ward v. City Trust. The obvious discouragement which this rule affords to an officer of a corporation using the funds of the corporation for his personal advantage and the consequent protection of the creditors of the corporation are sufficient reasons for its adoption. It can now be regarded generally as settled law. For a case applying the same principle to a different state of facts, see First Nat. Bank v. Greene, 114 S. W. (Ky.) 322, Decision No. 1165.

Kip v. Smith also construes section 56 of the Negotiable Instruments Law which is section 95 of the New York Act. That section provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith." It is clear under this section that mere negligence — failure to investigate where a reasonable man would investigate — is not sufficient to put a man on notice and it has been so held. Hibbs v. Brown, 98 N. Y. Supp. 253. The earlier English cases even before the Negotiable Instruments Act held this same view. Peacock v. Rhodes, Doug. 633. In 1824, however, Lord Tenterden laid down the opposite view. Beckwith v. Conall, 2 C. & P. 261; 12 E. C. L. 121. This view maintained for ten years only and in 1834, Lord Denman made "gross negligence" the test of the bona fides of the holder. Crook v. Jadis, 5 B. & Ad. 909. Finally the vast majority of the jurisdictions worked around to the view which is laid down in Kip v. Smith — mere failure to investigate circumstances which would put a reasonable man on guard does not constitute bad faith provided there has been actual good faith; gross negligence of itself is not sufficient to constitute bad faith but it may go to the jury as evidence of bad faith. The Negotiable Instruments Law is merely a re-enactment of this rule. Griffith v. Shirely, 74 Md. 591; Goodman v. Simonds, 20 How. (N. S.) 343; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191; Sandford v. Norton, 14 Vt. 228.

The same views will be found strongly expressed in the late case of First National Bank of Pleasant Dale v. Borchers, 120 N. W.

Digitized by Google

(Neb.) 142, Decision No. 1147, and also in Custard v. Hodges, 119 N. W. (Mich.) 583.

In Kip v. Smith the court said in part:

"The court instructed the jury in substance that, if the plaintiff had notice of facts which would put a man of ordinary intelligence and prudence upon inquiry, he would be charged with knowledge of the facts which the inquiry would have shown; and that, if he was guilty of gross negligence in not following up the inquiry which facts known to him suggested, the law would charge him with notice of all the facts which he might have ascertained by the inquiry, and that he could not be a purchaser in good faith. This, we think, was error. The Negotiable Instruments Law (Sanborn's St. Supp. 1906, §§ 1676–26) provides that, 'to constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his taking the instrument amounted to bad faith.' By the great weight of modern authority, gross negligence is evidence from which bad faith may be inferred, but it does not of itself constitute bad faith as matter of law. That is a question for the jury, after consideration of all the evidence. 1 Daniel, Negotiable Instruments, §§ 774 and 775, and cases cited in notes; 4 Am. & Eng. Encyc. of Law, p. 300; 7 Cyc., pp. 944 and 945. Such is substantially the rule adopted by this court in Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697 and Boyle v. Lybrand, 113 Wis. 83, 88 N. W. 904. Another question has presented itself to our minds in this connection which seems worthy of very serious consideration but as it was not raised or argued in either court, and is not necessary to be now decided, we express no opinion upon it. The question is this: Can a person be said to be a holder in due course who, without inquiry, takes from an officer of a corporation, in payment of a private debt, a negotiable note, which appears on its face to be the property of the corporation? In order to be a holder in due course, he must take it, 'in the usual course of business.' Is such a transaction in the usual course of business, in view of the principle that one who takes in payment of a private debt the promissory note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularity that may exist in its execution? Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111, and cases cited on page 116, 81 N. W. 1034. We merely suggest this question now. The case must go back for a new trial in any event, and upon such new trial the question of actual notice should again be submitted to the jury by proper special question. Should the jury again find actual notice, the question above suggested will be immaterial, but, if they find to the contrary, the question above suggested can be answered by the court after due consideration and argument as the facts bearing upon it seem to be undisputed."

See Decision No. 1139.

Digitized by Google

Bankruptcy: Preference: Notice to Creditor.

An interesting contrast to the rule in reference to negotiable instruments as laid down in the preceding note in discussing the case of Kip v. Smith, is found in the Bankruptcy Act. The case of Whitwell v. Wright, 115 N. Y. Supp. 48, decided February 3, 1909, in the New York Supreme Court is in point. A preference to one creditor over any others if made within four months before the filing of a petition in bankruptcy with the intent to give a preference and with the knowledge of the favored creditor that it is a preference is voidable by express provision of the act. What will constitute knowledge on the part of the creditor that he is receiving a preference? Whitwell v. Wright in line with prior decisions holds that if the creditor has reasonable cause to believe that the transfer to him is a preference, he will be held to have knowledge. The peculiar conditions surrounding the administration of the Bankruptcy Law, the temptation to and the opportunity of fraud which it seems to offer to dishonest debtors makes such a rule absolutely necessary if the Bankruptcy Act is not to be made a gigantic instrument of fraud.

It is well, however, in connection with this case to note the case of Tumlin v. Bryan, 165 Fed. 166, where it was held that in order to constitute a preference an actual preference must have been intended, i. e., it must have been intended to benefit one creditor at the expense of the others. The court said: "To sustain the decree it must appear that there was evidence to show that the defendant had reasonable cause to believe that it was intended by the payments in question to give a preference. Bankruptcy Act, § 60b. The reasonable implication of the statute, it has been held, is that the debtor himself must have intended a preference. In re First National Bank of Louisville, 155 Fed. 100, 84 C. C. A. 16; Hardy v. Gray et al., 144 Fed. 922, 75 C. C. A. 562. A careful reading of the evidence does not lead us to the conclusion that the defendant believed the firm to be insolvent. But a belief that a debtor is insolvent is a very different thing from the belief referred to by the statute — 'reasonable cause to believe that it was intended' by the payments to give a preference. It may happen that one, though in fact insolvent, will continue his business and make payments in the usual way, without a thought of preferring one creditor to another and with the hope and belief that he would finally be able to pay all. If these payments were made by the firm, without the thought of injuring other creditors, and in the belief that it would be able to pay them all, the defendant cannot be charged with reasonable cause to believe that a preference was intended. When a debtor pays, and a creditor receives, the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction. To let the mere fact of the bankruptcy

Digitized by Google

of the debtor within the four months make the transaction voidable would be to create uncertainty and uneasiness as to the probable result of every settlement between debtor and creditor. Reasonable cause to believe that a preference was intended cannot be held proved by circumstances that would merely excite suspicion. And circumstances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no 'reasonable cause' on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof of mere suspicion. Grant v. National Bank, 97 U. S. 80, 24 L. ed. 971; Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640." The full report of Tumlin v. Bryan will be found in this issue, Decision 1141.

The result of these cases would seem to make three things necessary in order to constitute an illegal preference:

(1) It must be made within four months of the filing of the petition.

(2) The bankrupt must actually intend it as a preference, i. e., an undue advantage to one creditor over the others.

(3) The creditor must have believed or have had knowledge which would have led a reasonable man acting in good faith to believe that the payment was intended as a preference. Mere knowledge or belief on the part of the creditor that the debtor is insolvent is not sufficient, there must in addition be the belief that a preference was actually intended. See also Booth v. Prete, 71 Atl. (Conn.) 938, and In re Cris. Bailey & Son, 166 Fed. 982.

In Whitwell v. Wright, the court said in part:

"Did the defendant Wright have reasonable cause to believe that the conveyance of the farm to him was intended to give him a preference over other creditors? Under the authorities he did have such cause to believe, if he had knowledge or notice of facts sufficient to put a reasonably cautious and prudent person upon inquiry. The intent of the bankruptcy law is to make an equal distribution of the assets of insolvent persons among their creditors and to prevent preferences and favoritism. At the time of this transaction Gates was insolvent, and Wright's claim against him unsecured and uncollectible by any legal proceedings. The motives which should lead Gates to prefer Wright were strong, and both have strong motives of personal interest to sustain this transfer. In view of these conditions, the testimony of both Gates and Wright must be scrutinized, and must not be allowed to prevail as against undisputable facts and circumstances."

Another interesting point is also decided in this case: Is the adjudication as to bankruptcy conclusive against all creditors or only against those who appear?

Digitized by Google

The court says:

"I find in the books a great variety of opinions on this question. In some cases it is held that the adjudication is in rem and conclusive as to everybody — and particularly as to all creditors of the bankrupt who are permitted by the bankruptcy law, if they choose, to appear and be heard in opposition to the adjudication. In other cases it is said that the rem involved is only the status of the individual proceeded against as a bankrupt and not conclusive, except as between the immediate parties to the proceeding and such creditors as do appear upon the particular facts alleged.

The court after stating that the federal courts do not seem to have definitely decided the point, adopt the former view on the authority of Graff v. Lang, 87 N. Y. Supp. 78.

See Decision No. 1140.

Bills and Notes: Bona Fide Holder: Banks.

The case of Alabama Grocery Co. v. First National Bank of Ensley, decided January 14th, 1909, and reported in 48 So. Rep. 340, and also as Decision No. 1142, in this issue, held that where a bank discounts commercial paper for a depositor and simply gives the depositor credit for the amount on its books it is not a holder for value so long as the deposit has not been checked out and the bank has not changed its position in any other way. This is entirely logical when it is recalled that value consists in something given up by the purchaser. Now the courts have held that the crediting of money to a depositor on the books of the bank gives the depositor no title to the money, it simply makes the bank the debtor of the depositor. This being so the relation between the parties in the case under discussion was simply this: Suppose after deducting discount the bank credited the depositor with $500. So long as the money is not withdrawn, the bank is simply indebted to the depositor for $500 on the credit, and the depositor is indebted to the bank for $500 on the note. The bank has therefore not changed its position since if, before any of the money is withdrawn, it learns of any defect in the note it can simply set off the debts and refuse to allow the deposit to be drawn against. If, however, the bank before notice of any infirmity in the note has changed its position in any way, as by certifying a check against the deposit which check has passed into the hands of a bona fide holder for value, then, of course, the bank is a holder for value of the note.

The court said in part.

"Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of said

Digitized by Google

paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues, and the deposit is not drawn out, the bank is held subject to the equities of the prior parties, even though the paper has been taken before maturity and without notice. Central National Bank v. Valentine, 18 Hun (N. Y.) 417; Manufacturers' National Bank v. Newell, 71 Wis. 309, 37 N. W. 420; Bank v. Huver, 114 Pa. 216, 6 Atl. 141; Dougherty v. Central National Bank, 93 Pa. 227, 39 Am. Rep. 750; Dresser v. Missouri, etc., Co., 93 U. S. 92, 23 L. ed. 815; First National Bank v. Nelson, 105 Ala. 180, 166 So. 707.

"The court erred in giving the affirmative charge for the plaintiff and under the pleadings and evidence should have given the affirmative charge for the defendant. Noble v. Walker, 32 Ala. 459."

See Decision No. 1142.

Bills and Notes: Accommodation Paper: Transfer After Maturity.

An interesting decision was handed down on February 16, 1909, by the Supreme Court of Wisconsin, Marling v. Jones, 119 N. W. 931. It is of course elementary that one who takes commercial paper after maturity is not a holder in due course. Such a taking gives the one taking notice of all facts which affect the validity of the note. Now section 29 of the Negotiable Instruments Act (section 55 of the New York Act) provides: "Such a person (accommodation party) is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument, knew him to be only an accommodation party." On this the Wisconsin court argues — taking after maturity gives notice of all facts, it, therefore, gave notice at the time of taking that the party sought to be charged was an accommodation party. But the statute expressly provides that as against a holder for value notice of this fact is no defense. Had the holder paid value and taken with notice before maturity, by express provision of the statute he could enforce the note against an accommodation party. The mere fact that taking for value after maturity charges him with notice of a fact although he may not actually have notice, cannot affect his rights when actual notice of the same fact could not affect his rights. It is to be noted that the statute in the section under discussion uses the words "holder for value" and "not holder in due course.."

The court said in part:

"No doubt there exists a class of defenses in favor of the accommodation maker of negotiable paper which may not be urged in cases

Digitized by Google

$1000 00/100

New York, Feb. 3, 1905 No. 13

One year after date I promise to pay to the order of Manufacturers' Commercial Co. One Thousand 00/100 Dollars at 664 Broadway, Newport City

Value received.

Due Feb. 3 1906

Samuel Blitz

This note was made out to the order of the Manufacturers' Commercial Company, a New Jersey corporation. Before the maturity of the note, the Manufacturers' Commercial Company, a New York corporation was formed which took over all the assets and assumed all the liabilities of the New Jersey corporation, including the note in question. The New Jersey corporation had never taken out the license required by the Corporation Law of New York authorizing it to do business in New York. Hence neither it nor its assignee could sue on this note which was a contract made in New York. The question, therefore, was: Was the New York corporation a mere assignee of the New Jersey corporation or was it a holder in due course? The court in Manufacturers' Commercial Company v. Blitz held that as the New Jersey corporation had not indorsed the note, the New York corporation was a mere assignee and hence could not maintain the action,

See Decision No. 1148.

Digitized by Google

where the note is fair on its face and negotiated in due course before due to a purchaser for value, without notice or knowledge of any infirmity, but which might be urged in favor of the accommodation maker if the note were overdue when negotiated, but the fact that the accommodation maker received no consideration is not one of these defenses, so long as the note was negotiated by his express of implied authority. The fact is here established that this note was in its inception accommodation paper. Jones made to Herman no express restriction upon its use for that purpose. We do not overlook the testimony of Brand with reference to conversations between him and Herman not in behalf of Jones, which the court below from its findings must have ejected as incredible. We approve this rejection. The testimony is overborne by the circumstantial evidence. It is a question upon which the precedents are at some variance whether or not the agency of the party accommodated to use the accommodation paper to raise money thereon (no express agreement appearing) expires with the maturity of the paper. The greater number of courts seem to favor the view that the agency to negotiate an accommodation paper and raise money thereon is not so limited. The courts of this State are not yet committed upon the questions presented, and it seems more in harmony with the uniform Negotiable Instruments Law, and with the weight of judicial authority, to hold, as we do, that the mere fact that the accommodation note was transferred by the party accommodated after due to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note, and without consideration moving to the accommodation maker. This necessitates a modification of the judgment of the court below so as to permit the appellant to take judgment against the accommodation maker, Jones."

See Decision No. 1143.

Bills and Notes: Transfer Without Indorsement: Holder in Due Course.

The complications which arise in these days from the frequent incorporation, reincorporation, merger, dissolution, etc., of corporations find a striking illustration in the case of Manufacturers' Commercial Co. v. Blitz, 115 N. Y. Supp. 402, a decision of the Supreme Court of the State of New York, Appellate Division, First Department. Here it appeared that defendant had executed a note to the order of Manufacturers' Commercial Co., a New Jersey corporation, payable in one year. During the year the Manufacturers' Commercial Co., a New York corporation, was formed which took over all the business, assets, and liabilities of the New Jersey Company including the note above mentioned. Suit is now brought on this note by the New York Company. The New Jersey Company had never indorsed

Digitized by Google

the note to the plaintiff. On the trial it was not proved that the New Jersey Corporation had ever obtained a certificate enabling it to do business in New York (section 15 of the General Corporation Law) and the court on appeal reaffirmed the well-established rule that if it is not proved that a foreign corporation has obtained this certificate it cannot recover on any contract made in New York. This applies also to any assignee of such contract.

It was strenuously insisted on appeal that the plaintiff came within the rule of Halsey v. Jewett Dramatic Co., 190 N. Y. 231, 83 N. E. 25, that while it is true that if the foreign corporation which has not obtained the permit cannot recover on a contract neither can its assignee, nevertheless that this does not apply to a holder in due course of a negotiable instrument transferred by such corporation, as such a one takes free from the equities and may recover even though the corporation could not. The court reaffirmed this rule but pointed out that the plaintiff in the case under discussion was not a holder in due course as it was a different corporation from the payee of the note, though both had the same name, and the payee had never indorsed it over. Not taking by indorsement plaintiff was clearly not a holder in due course. It, therefore, took only by assignment and stood in the shoes of the New Jersey Corporation. The decision is undoubtedly correct.

The court said in part:

"The learned counsel for the respondent concedes that the law is as stated but insists that the plaintiff comes within the exception pointed out in Halsey v. Jewett Dramatic Co., supra, in that this action is brought upon a negotiable instrument taken from the foreign corporation in good faith and before maturity. There is no proof in the record that the plaintiff took the note before maturity. The plaintiff holds the note, and has possession of it, and produced it upon the trial. The plaintiff is not, however, the payee, nor the indorsee, because the original payee never indorsed it over to the plaintiff by actual indorsement. Section 79 of the Negotiable Instruments Law provides, that where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferee obtains such title as the transferror had; but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. Such indorsement never having been made, plaintiff cannot be deemed to be a holder in due course, as defined by sections 2, 60, 61, 91, and 98 of the Negotiable Instruments Law. The plaintiff, therefore, failed to prove that it was the holder of the note in suit and took it in good faith before maturity, and did not bring itself within the exception stated in Halsey v. Jewett Dramatic Co., supra, so as to relieve it from proving that its transferror or assignor, the New Jersey corporation, held a certificate permitting it to do business in this State."

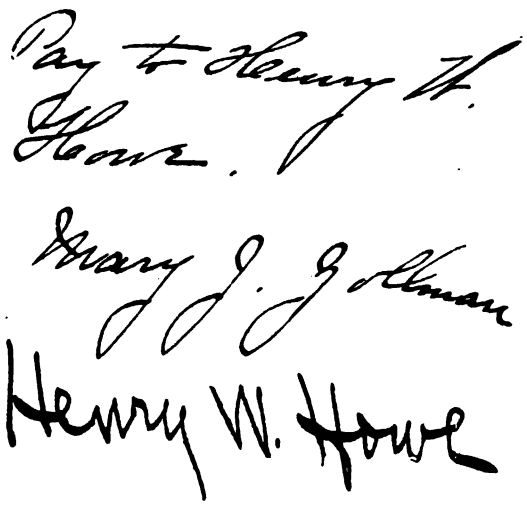
See Decision No. 1148.

Digitized by Google

Bills and Notes: Negotiability: Effect of Insertion of Words Indicating Security.

$1000 00/100
Chicago, Ill. November 7, 1912
One year after date I promise to pay
to the order of Mary J. Gotleman,
Seven Hundred & 00/100 Dollars
at
Value received, I pledge and hereby grant a lien upon
this Certificate, with the right to sell the same, to secure
the payment of this note at maturity.
Due
No.
Mary J. Gotleman

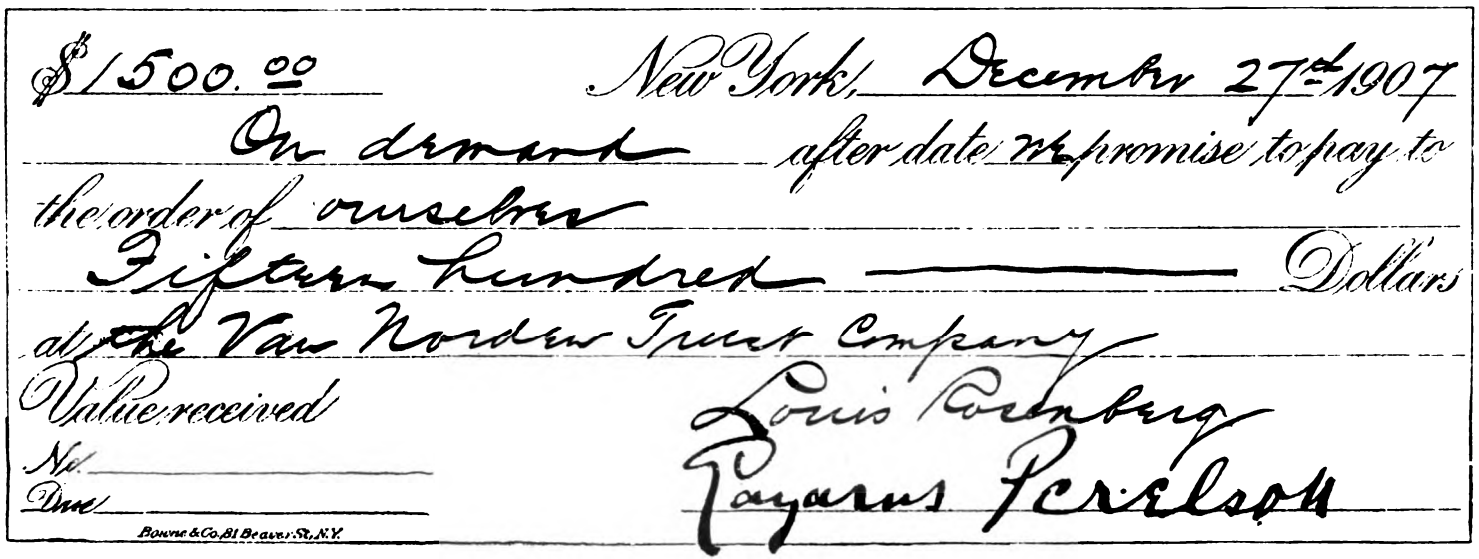
Digitized by Google



It was claimed that the words indicating the collateral security inserted in this note destroyed its negotiability and rendered it subject to all defenses even in the hands of a bona fide holder for value. The court in Zollman v. Jackson Trust and Savings Bank held that the insertion of words indicating collateral security did not destroy the negotiability of the note.

See Decision No. 1149.

Digitized by Google



$ 1500.00 New York, December 27th 1907

On demand after date we promise to pay to the order of ourselves

Fifteen hundred ——— Dollars

at the Van Norden Trust Company

Value received

No.

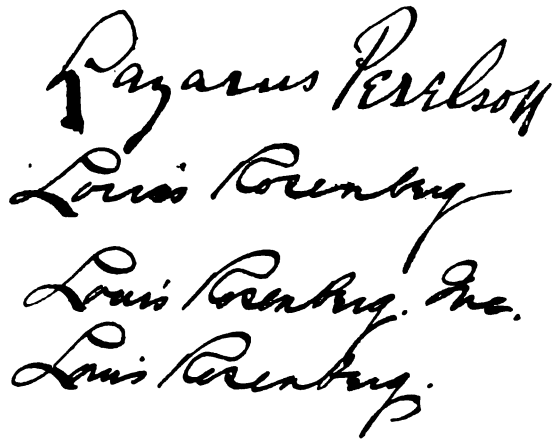
Due

Louis Lorenberg

Payarus Pericelson

Bourne & Co. 81 Beaver St. N.Y.

Digitized by Google



The indorsements "Louis Rosenberg, Inc.," followed by "Louis Rosenberg," on this note were proved to constitute one indorsement which was meant to bind the corporation. The official signature of the corporation was "L. (not Louis) Rosenberg, Inc., by Louis Rosenberg, Treasurer." The corporation claimed it was not liable on the note as it had not indorsed it officially. It was proved, however, that Louis Rosenberg was the treasurer of the corporation, that he had full power to bind it by indorsement of commercial paper, that he had signed the indorsement in question intending to bind the corporation, and that the note had been negotiated with the understanding that the indorsement was the indorsement of the corporation. Under these circumstances it was held in Van Norden Trust Co. v. L. Rosenberg, Inc., that the corporation could not avoid responsibility on the indorsement.

See Decision No. 1151.

Digitized by Google

Bills and Notes: Recital in Notes: Negotiability.

Zollman v. Jackson Trust & Savings Bank, 87 N. E. (Ill.) 297, holds that a recital in a note that it is secured by a trust deed does not take away its negotiability. It is of course elementary that any recital in an instrument which qualifies or renders conditional or uncertain the promise to pay, makes the instrument non-negotiable. The reason for this rule is that the law desires negotiable paper to circulate freely and anything which renders uncertain either the amount or the payment thereof is inconsistent with the idea of free circulation. Clearly, however, a recital of security instead of impeding circulation greatly encourages it by making payment more uncertain.

Such was undoubtedly the rule at common law. Illinois has not adopted the Negotiable Instruments Law but the rule is unquestionably the same under that act.

Section 5 (section 24 of New York Act) provides: "The negotiable character of an instrument otherwise negotiable is not affected by a provision which authorizes the sale of collateral securities in case the instrument be not paid at maturity."

In Zollman v. Jackson Trust, etc., Co. the court said in part:

"The appellant contends that, since the notes in question showed upon their face that they were secured by a trust deed, appellee cannot be regarded as an innocent holder of such notes, and that the purchaser should be held to have notice of all facts that inquiry would have disclosed. This is a misapprehension of the effect of such recital. A recital upon a promissory note, to destroy its negotiability, must be of a kind that in some respects qualifies or makes uncertain or conditional the promise. Siegel, Cooper & Co. v. Chicago Trust & Savings Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 40; Biegler v. Merchants' Loan & Trust Co., 164 Ill. 197, 45 N. E. 512. In the case last above cited it was held that a note which recited that 'this note is secured by a lien upon my interest in certain horses described in agreement this day made between G. W. Leihy and myself' was nevertheless a negotiable instrument, and that a purchaser for value before maturity held such note free from any latent defenses that the maker might have against the payee. See Mindlin v. Applebaum, 114 N. Y. Supp. 908."

See Decision No. 1149.

Bills and Notes: Corporations: Indorsement.

Van Norden Trust Co. v. L. Rosenberg, Inc., 114 N. Y. Supp. 1025, illustrates the liberality of the courts in dealing with the interpretation of negotiable instruments. In this note the indorsement was "Louis Rosenberg, Inc." and underneath "L. Rosenberg." (See copy

Digitized by Google

of note in this issue.) There was no word indicating that "L. Rosenberg" had signed in an official capacity. These facts, however, appeared: Louis Rosenberg was treasurer of the corporation, he had full authority to indorse its paper, he had indorsed this note intending to bind the corporation and the note was negotiated with the understanding that it was indorsed by the corporation. Held that the corporation was liable on the indorsement.

This case must not be confused with the celebrated case of First National Bank v. Wallis, 150 N. Y. 455. In that case the note was worded "We promise to pay" was signed "William T. Wallis, President, George T. Smith, Treasurer," and on the margin was printed "Wallis Iron Works." It was held that a holder in due course could hold Wallis and Smith individually on the note as it purported to be their individual obligation and the words "President" and "Secretary" were merely descriptive. It did not hold that if the note was intended to be the note of the corporation, and was signed with authority, that the corporation could not be held but that a holder in due course could rely on its being the individual note of the makers provided of course at the negotiation the holder did not know that it was the note of the corporation. The two cases are in harmony and the result would seem to be:

(1) A note made out in the words "We promise to pay" and signed by the names of the officers and not by the name of the corporation purports to be the individual note of those signing.

(2) One receiving such note, without knowing that it is the note of the corporation, may hold the signers individually.

(3) One receiving such note knowing that it is intended to be the note of the corporation, can hold the corporation, if the note were executed with authority.

(4) Probably one receiving such note, not knowing that it is in fact the corporation's note but afterwards learning of such fact, can hold either the corporation or the signers.

The court said in part:

"The note contains, among other indorsements, that of 'Louis Rosenberg, Inc.,' and underneath is written the name of the defendant 'Louis Rosenberg;' and the defendant corporation urges that, since its proper name is 'L. Rosenberg, Incorporated,' and that since neither the word 'treasurer' nor any other name designating the office of the person making the alleged indorsement of the corporation appears, such indorsement is not its corporate indorsement. It is undisputed that, when the indorsement was made, Louis Rosenberg, the person who so wrote the name of the corporation and his own underneath, was the treasurer of the defendant corporation. It also appears from the evidence that at a meeting of the board of directors of the defendant corporation, held on March 27, 1907, the said Louis Rosenberg was elected its treasurer, at which meeting a resolution was adopted:

Digitized by Google

$1000 00/100

Muskegon, Mich Dec 15th 1904

Four Months after date we promise to pay

to the order of Hackley National Bank

Ten Thousand 00/100 Dollars

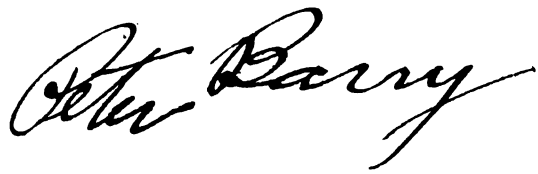
at The Hackley National Bank.

Value received with interest at 6%.

No. Due

Chicago & Muskegon Trans Co

Digitized by Google



This note was filled out in Michigan with the exception of Barry's indorsement. It was sent to Barry in Wisconsin to be signed and forwarded to payee in Michigan. Barry signed it in Michigan and forwarded it as directed. The court in Hackley National Bank v. Barry held that this note took effect only on its delivery to the payee; that as this delivery was in Michigan the note was a Michigan contract and governed by the law of Michigan even as to Barry, who had signed in Wisconsin.

See Decision No. 1152.

Digitized by Google

"'That Louis Rosenberg, the treasurer of the company, be and he hereby is instructed and empowered to open and keep account of deposit and discount with the Van Norden Trust Company, of the city of New York, in the name and for the use of the company, to deposit in the said bank to the credit of this company from time to time any and all moneys, checks, drafts, notes, acceptances, or other evidences of indebtedness (whether belonging to this company or otherwise) which may now be or which may hereafter come into its possession, and in the name of this company to withdraw by checks the same or any part of the proceeds thereof, to pledge the credit of this company as the said treasurer may from time to time find necessary or convenient and for these and all other purposes to sign, indorse, accept, make, execute, and deliver any and all checks, notes, drafts and bills of exchange on behalf of the company.'

"The counsel for the appellant has not referred us to, nor are we aware of, any authority which prescribes any particular form of signature in order to bind a corporation. That the agent who makes the signature need not add his own name after that of the corporation was explicitly said in Youngs v. Perry, 42 App. Div. 247, 59 N. Y. Supp. 19. That such a variation from the correct corporate name as we have in this case would be harmless is, we think, manifest without argument or authority. We have the full name, 'Louis' instead of the initial, 'L.' and the abbreviation, 'Inc.,' instead of the complete word 'Incorporated.' If the signature was intended to be that of the corporation, the variance is ineffectual to defeat that intention. Indeed, there are cases where it has been held that the signature of a person describing himself as an officer or an agent of a corporation will in fact bind the corporation, if it was so intended. Conant v. American Rubber Tire Co., 48 App. Div. 327, 62 N. Y. Supp. 972, and cases cited. The form of the indorsement is therefore immaterial, where it is apparent that the company intended to be bound thereby, and especially where, as hereafter shown, the defendant corporation did receive the benefit of the transaction with full knowledge. 10 Cyc. 1027. The plaintiff's manager testified upon the trial that the indorsement in question was added after he had told the defendant corporation's treasurer that he wanted its corporate signature on the note to add additional strength to it. The latter denied that such conversation was had, and testified that the former told him that he wanted such indorsement just as a matter of form, and that he, the defendant corporation's treasurer, thereupon told him that he had no power to bind the corporation, all of which the plaintiff's manager denied.

"Upon the trial the defendant's counsel placed much emphasis upon the claim that the usual signature of the corporation was 'L. Rosenberg, Incorporated, by Louis Rosenberg, Treasurer,' whereas the indorsement upon the note was 'Louis Rosenberg, Inc.,' followed by the signature of Louis Rosenberg himself. The trial justice left it to the jury to determine whether the indorsement was made in the manner claimed by the plaintiff. As the jury, by its verdict, found this proposition in the affirmative, they must not only have deemed such discrepancy of no importance, but must as well have given credit to the plaintiff's manager's version of the transaction as against that of the defendant's treasurer. That they were justified by the evidence in so doing there can be no doubt."

Digitized by Google

The rule as to unincorporated associations is that each one signing is liable individually even though words indicating official capacity be added to the signature. A recent pronouncement of this rule is found in the case of Evans v. M. C. Lilly & Co., 48 So. Rep. (Miss.) 612.

See Decision No. 1150.

Bills and Notes: What Law Governs.

It is elementary that the law of the place in which a contract is completed governs the validity and the nature of the contract. It is also well settled that the place where the act is performed which makes he contract binding, is the place where the contract is completed. The Negotiable Instruments Law, § 16 (section 37 of the New York Act) provides: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto." Hence the contract embodied in a negotiable instrument becomes complete on delivery.

An application of these principles is presented in the case of Hackley National Bank v. Barry 120 N. W. (Wis.) 275. In that case a note was executed in Michigan and sent to Wisconsin for the signature of a person, who signed his name on the back and by direction of the maker sent it to the payee in Michigan. The delivery here was on receipt by the payee. Delivery completed the contract. Delivery took place in Michigan. Therefore, it was a Michigan contract and the liabilities of the parties, even of the one signing in Wisconsin, were determined by the law of Michigan. So the court held.

The court said in part:

"The evidence was to the effect that the note was sent by the maker or his agent to Barry, for his signature; that he signed and by direction of the maker sent the paper to the payee at Muskegon, Mich. It is the opinion of the court that the contract is governed by the law of the State of Michigan. Contrary to the law here, by the decisions of the Supreme Court of such State, the prima facie indication, by the mere fact of the name appearing on the back of the note, was rebutted by proof that it was so signed before delivery."

See Decision No. 1152.

Bills and Notes: Note Payable in Instalments: When Past Due.

Norwood v. Leeves, 115 S. W. (Tex.) 53, holds that when a note is payable in instalments, several of which are overdue and unpaid, the note itself is overdue, and one taking it, takes subject to the equities. Citing Harrington v. Claflin, 91 Tex. 294, 42 S. W. 1055.

Digitized by Google

April 16th, 1907.

$6,000.

I promise to pay to the order of J. B. Newly, Six Thousand Dollars as follows:

Two Thousand Dollars on July 16th, 1907.

Two Thousand Dollars on October 16th, 1907.

Two Thousand Dollars on January 16th, 1908.

Value received, with interest. B. D. Norwood

Bills and Notes: Note Payable In Installments: When Overdue.

Digitized by Google

This note was negotiated after the first two of the instalments therein provided for were due and unpaid but before the maturity of the last instalment. The court in Norwood v. Leeves, 115 S. W. (Tex.) 53, held that the whole note was overdue, and therefore the transferee was not a holder in due course. A different result might be reached under the Negotiable Instruments Act.

See Decision No. 1153.

Digitized by Google

The Negotiable Instruments Act is silent on this point, but section 2 (21 of the New York Act), par. 3, allows a provision to be incorporated in the note providing for payment in instalments and for the whole note's being due on failure to pay any instalment when due. This would seem to indicate that unless such a provision be inserted the whole note would not be due on failure to pay one instalment. The provision would not be incorporated in the act allowing such an insertion in an instrument if the law would imply it, even if it were not there. It would seem, therefore, that under the Negotiable Instruments Act an opposite result to Norwood v. Leeves would be reached.

The court said in part:

"The notes were payable in instalments, several of which were long past due and unpaid at the time appellee became the owner of the paper. He therefore stood in the position of a purchaser of the notes after their maturity. Harrington v. Claflin, 91 Tex. 294, 42 S. W. 1055. As such a purchaser, he held them subject in his hands to equities which might have been urged to them while they were in the hands of L. B. Newby. Sayles' Ann. Civ. St. 1897, art. 307."

See Decision No. 1153.

Bills and Notes: Accommodation Indorser: Maker's Liability.

It is clear that the maker of a note must reimburse one who indorses for the maker's accommodation for any loss he may have suffered. It is to be noticed, however, that this right is merely one of reimbursement. It is quasi-contractual, and the accommodation indorser cannot recover from the maker until he has paid out something by reason of his indorsement, and then only what he has actually paid out. The right is entirely of reimbursement. Such was the holding in Blanchard v. Blanchard, 113 N. Y. Supp. 882, Decision No. 1154.

The court said in part:

"When the plaintiff's intestate indorsed the note in question for the accommodation of the defendant the law implied a contract between them that the maker would reimburse the indorser for any moneys he might be compelled to pay by reason of such indorsement. But the indorser could maintain no action against the maker until he had in fact made payment on the note by reason of his liability as indorser. As against a principal debtor, by a surety who has paid the debt, the statute of limitations runs, not from the time when the debt was due, but from the time when the surety paid it. Thayer v. Daniels, 110 Mass. 345; Appleton v. Bascom, 3 Metc. (Mass.) 169; Hall v. Thayer, 12 Metc. (Mass.) 130; Am. & Eng. Encyc. of Law (vol. 27), p. 481."

See Decision No. 1154.

Digitized by Google

Banks and Banking: Certified Check: Bona Fide Holder.

After discussing in general the well-established rules as to the effect of a certification of a check by a bank, and reaffirming the principle of Alabama Grocery Co. v. First National Bank, Decision No. 1142, supra, where it was held that a bank, which has merely given credit to a depositor for the amount of a note and where the deposit is intact, is not a bona fide holder, Blake v. Hamilton Dime Savings Bank Co., 87 N. E. (Ohio) 73, Decision No. 1155, establishes on principle the suggestion offered by us in that discussion that the certification of a check against such deposit would render the bank a bona fide holder for value. The effect of this is seen in the decision of the case at present under discussion, which holds that a bank which has certified a check not only can, but must, pay it, even though after certification it receives notice that the check was obtained by fraud.

In this case one Werbel sold a horse to Blake. Blake gave in payment a certified check. Werbel deposited same in his bank. Before the check was collected Blake stopped payment on the ground of fraud. Held, the law intends certified checks to pass as money. If Blake had paid Werbel money and deposited same in his bank, it would have become the property of his bank. It is, of course, elementary that a deposit of money in a bank simply creates the relation of debtor and creditor. The bank owns the money and owes the depositor. Werbel's bank, therefore, in this case, owned the check, and therefore could collect it independently of any claim between Blake and Werbel.

The case contains a valuable discussion of the effect of certification, the deposit of money, collection of paper by banks, etc.

The court said in part:

"In C., H. & D. R. R. Co. v. Bank, 54 Ohio St. 60, 71, 42 N. E. 700, 702, 31 L. R. A. 653, 56 Am. St. Rep. 700, it is said by Spear, J.: 'The relation of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and cestui que trust.' And again: 'The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous.' The money would belong to the bank, and Blake could not acquire any interest in it or impose any liability on the bank merely by notifying it that Werbel had obtained the money from him by defrauding him in a horse trade. If, instead of money, Blake had traded a piano to Werbel for the horse, it may be that Blake could repudiate the trade on the ground of fraud, and that after tender back of the horse the title to the piano would reinvest in him, and that he could then recover it from any one excepting a bona fide purchaser; but money loses its identity, and, if the relation of debtor and creditor between the bank and Werbel would arise upon the deposit of the money, then the bank would necessarily be treated as a bona fide purchaser, and title to the money would not be restored to Blake even by a repudia-

Digitized by Google

tion of the trade and a tender back of the horse. Now, while it is true, as has been pointed out, that the delivery of the check was not payment for the horse, and that Blake was liable on the check, still, if certified checks are to circulate as money and to perform the useful purpose in trade they have heretofore, the deposit of them in bank to the credit of the holder must be, so far as the rights of the indorser are concerned, treated as a deposit of money. The transaction under consideration may serve in some slight measure to illustrate their use. Blake may have supposed that Werbel would want cash for the horse and would not accept his check, and, not wishing to carry the money from Cincinnati to Hamilton, he procured the certification of the check, and Blake accepted it as readily as he would have accepted cash; but, if he could not accept it with the same security that he could cash, then, under such circumstances, a certified check could not be used at all, or the indorsee of such a check, if he wishes to avoid embarrassment and delays, such as have resulted in this case, must at once present the check for payment and then deposit the money, instead of the check, in bank. This being so, then the obligation of the Franklin Bank to pay the check was not affected by the notice to it by Blake not to pay, and the right of the Hamilton Bank to enforce payment was not affected by notice of Blake's claim."

See Decision No. 1155.

Banks and Banking: Checks: Payment: Irrevocability.

In connection with the cases above discussed, Alabama Grocery Co. v. First National Bank, Decision No. 1142, and Blake v. Hamilton Dime Savings Bank, Decision No. 1155, is to be noted the case of Consolidated National Bank v. First National Bank, 114 N. Y. Supp. 308, Decision No. 1159. We have seen in the above cases that when a bank discounts paper for a depositor and gives him credit therefor on its books, so long as the credit is not drawn against, the bank is not a holder in due course, as it has not changed its position. To make this true it is necessary that, if the note turn out to be worthless before the credit given on its discount is checked out, the bank has the power to cancel the credit. If it had not this power it would have changed its position immediately on giving the credit, and hence be a bona fide holder for value of the note. The case of Consolidated National Bank v. First National Bank would seem to qualify this rule, for it holds that when a depositor presents to a bank a check of another drawn on the bank itself and receives credit therefor on the books of the bank, this is the same as if the depositor had cashed the check and deposited the currency, and the bank cannot cancel the credit given if the deposited check subsequently turns out to overdraw its maker's account. If this rule be confined to the case where the deposited item is a check drawn against the same bank in which the deposit is made, there can be no criticism of it, and we are aware

Digitized by Google

of no case extending it further. If the depositor instead of depositing the check, had first presented it for certification, and after certification had deposited it, there is no question that the bank would be liable even though the maker had not sufficient funds. Sections 187, 62 of Neg. Inst. Act, 323 and 112 of the New York Act. The court in the case under discussion treats the receipt by a bank of a check drawn on itself and the giving of credit for it as a deposit on its books as indicating an intention to pay same and as equivalent to payment. If this be a correct interpretation of the acts of the bank, the decision cannot be quarreled with as, if the bank would be liable on certification, it certainly should be liable on payment.

The court said in part:

"The check, when presented to the defendant, was paid by its acceptance by the defendant as valid, by marking the same paid, crediting the amount to the account of the plaintiff, and charging it against the account of Davis & Co. As a matter of law, that closed the transaction without power of revocation. The defendant bank had become the debtor of the plaintiff's agent to the extent of the amount of the credit given, which was the amount of the check. In Oddie v. National City Bank of New York, 45 N. Y. 735, 741, 6 Am. Rep. 160, the court says:

"'Here the plaintiffs clearly put in the check as a deposit, and the defendants has clearly received it as such, and credited the plaintiff with it. The credit on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the passbook of the plaintiffs, and entered upon the books of the bank. Financial business is transacted at banks in large amounts, with great rapidity, but according to definite and certain rules, which are well understood and acted upon by those engaged in that business. Very little is said, but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business. In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs and then deposited. When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in Pratt v. Foote, 9 N. Y. 463; but if it accepts such a check and pays it, either by delivering the currency or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer. and, if it elects to

Digitized by Google

pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter.'

"In legal effect there was just as much a payment of the check of $150 by the defendant to the plaintiff through its Albany correspondent, as though a messenger from the plaintiff bank had presented the check at the teller's window of the defendant bank and received therefor the currency. Inasmuch as this conduct took place before the commencement of the Seaman action and before judgment therein, that action cannot, of course, be a bar to the maintenance of this. Suppose that an officer of the plaintiff bank had presented this check personally to the defendant bank on the 12th of September and received therefor $150 currency. The transaction was perfectly valid. Davis & Co. had nominally to its credit with the defendant bank a sum sufficient to pay the check, and it cannot be supposed that Seaman, in the action which he brought, could have reached this sum of $150 in the hands of the plaintiff bank after such actual payment in cash. The defendant is in no better position, as the facts are. If there had been as there was in law, actual payment of this check by the defendant on the 12th of September, the Seaman action could not rightfully reach the $150 of such payment; if the defendant has paid out the full sum of $473 to Seaman, it has, of course, done so at its peril, and is unfortunately the loser."

See Decision No. 1159.

Bills and Notes: Notice of Dishonor: Notice to Agent.

Scarbrough v. City National Bank, 48 So. (Ala.) 62, Decision No 1160, holds that an oral notice of dishonor given to one present at the place of business of the defendant and in the service and employ of defendant provided that all things considered the notice was competent to notify the defendant of dishonor and that he is looked to for payment is sufficient. Alabama has not accepted the Negotiable Instruments Law. But the ruling would undoubtedly be the same under that act, at least as regards oral notice and what the notice must contain. Section 96 (section 167 of the New York Act) specifically provides for this. It is questionable, however, whether, under the act, it would not be necessary to prove positive authority on the part of the agent to receive notice and not merely that he was in the employ of defendant, as in the case under discussion. Section 97 (section 168 of the New York Act) provides: "Notice of dishonor may be given either to the party himself or to his agent in that behalf."

The court said in part:

"As to the notice of dishonor, the law recognizes a verbal notice as sufficient. Martin, Dumee & Co. v. Brown, Shipley & Co., 75 Ala. 443, 448; Abels v. Planters & Merchants' Ins. Co., 92 Ala. 385, 9 So. 423; Stephenson v. Primrose, 8 Port. 155, 159, 33 Am. Dec. 281; 7 Cyc. 1104. The fact that it was given to an agent cannot change the

Digitized by Google

above principle. The case of N. Y. & Ala. Contracting Co. v. Selma Springs Bank, 51 Ala. 305, 23 Am. Rep. 552, did not refer to a notice given to any one at the maker's place of business. In addition to this there was evidence from which the court, acting as a jury, could find that Noble was the agent of defendant with authority to receive notice. As to the form of the notice, no particular form is required. 'All that is necessary is that . . . the party liable and intended to be charged should be apprised of the dishonor and that he is looked to for payment.' Martin, Dumee & Co. v. Brown, Shipley & Co., supra. Taking the notice and the reply together, it was open to the judge to infer that it was understood by both parties that the note had been dishonored and hat the plaintiff looked to the indorser for the payment, and hence that the notice was sufficient."

See Decision No. 1160.

Bills and Notes: Antecedent Indebtedness.

Another decision touching on the famous dispute as to whether the Negotiable Instruments Act has changed the rule of Coddington v. Bay is the case of Macaulay v. Holsten, 114 N. Y. Supp. 611, Decision No. 1163. It will be recalled that all courts are agreed that paper taken as payment for an antecedent indebtedness is taken for value. The dispute before the passage of the act was as to whether paper taken as collateral security for an antecedent indebtedness was taken for value. The federal courts and several of the States held this last to be for value also. New York held it was not. Since the passage of the act, the dispute is as to whether section 25 (section 51 of the New York Act) has changed the New York rule. Even in New York there are decisions both ways, and the Court of Appeals has not yet passed on the question. Macaulay v. Holsten, a Special Term decision by Justice Carr of the Supreme Court, says that the taking of notes as collateral security for a pre-existing indebtedness does constitute value. This has been criticized as dictum, as it is claimed that the plaintiff in this case had evidently taken the notes in question in payment, having given the payee credit therefor on the running account on which payee was indebted. To us this does not seem to be the case, as after the notes were returned unpaid the present plaintiff took judgment against the payee on the account. Clearly he could not have done this had he accepted the notes as payment of the debt. In our opinion this may be considered one more case in favor of the view that the New York rule has been changed. But the decisions are so conflicting that the matter will never be cleared up until the Court of Appeals passes thereon.

The court said in part:

"The whole question involved in this action is whether the plaintiff holds these two notes for value. The notes appear to have been made

Digitized by Google

by the defendants, in favor of the payee, for the payee's accommodation. Accommodation paper never has legal inception until it is negotiated for value. The payee on the notes was indebted to the plaintiff on a running account, the last item of which antedated the notes several months. He took the notes from the payee, and credited him with the amount thereof, and deposited the notes in his own bank for collection. They came back unpaid, and he thereupon recharged the payee of the notes with the amounts thereof. Subsequently he took a confession of judgment from the payee of the notes for the whole amount of the running account, making no deduction for the amount of the notes. The defense pleaded is simply that the paper was accommodation paper, to the knowledge or information of the plaintiff, and that he gave no value for the notes. The taking of these notes, either as conditional payment of, or as collateral security for an antecedent indebtedness, would have been for value, unless there was a fraudulent diversion of the notes from a restricted use imposed by the maker."

See Decision No. 1163.

Bills and Notes: Failure of Consideration: Fraud: Burden of Proof.

It has long been settled that where failure of consideration is set up in defense to an action on a note all the presumptions are with the holder, and the maker must prove not only the fact, but also that the holder took with notice. On the other hand, it has been just as well settled that where fraud in the making of the instrument is proved the presumption is against the holder, and he must prove affirmatively that he was not a party to the fraud and took without notice.

These rules are reaffirmed in Johnson County Savings Bank v. Kemp Mercantile Co., 114 S. W. (Tex.) 402.

The court said in part:

"In this connection section 59 (section 98 of the New York Act) of the Negotiable Instruments Law should be noted. It provides: 'Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title in due course.'

"When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid value for it without notice of the fraud. See Packard v. Figlinolo, 114 N. Y. Supp. 753."

See Decision No. 1166.

Bills and Notes: Payments After Transfer.

Becker v. Hart, 113 N. Y. Supp. 1053 (App. Div., 2d Dept.), Decision No. 1167, holds, that where the maker made payments on note to payee after payee had transferred the note to a holder in due course,

Digitized by Google

without insisting on the production of the note, he was not entitled to credit for the payments. It is so easy for the maker to protect himself by insisting on the production of the note when making his payments that this rule seems pre-eminently just. It is also in harmony with the spirit of the Negotiable Instruments Act, as it increases negotiability by increasing the protection of the holder in due course.

The court said in part:

"Although the defendants gave testimony tending to show payments to Levy to be applied upon the note, it also appeared from their testimony that Levy did not produce the note on the occasion of payment, but said that he had mislaid it; that he could not find it; that he would hunt for it and produce it, but that he never did so. When the court directed the verdict, there was before it the testimony of the plaintiff and her son, both witnesses called by the defendants, that the son came to the mother shortly after the making of the note and said that her employer, Levy, would sell the note for $1,000, which was then paid by the plaintiff to her son, who gave the money to Levy, but transferred the note to the plaintiff, who has ever since been the holder thereof. The court was not required to present the question of payment to the jury, inasmuch as the contention was that these payments were made to Levy, as the owner of the note (not as the representative of the plaintiff), without any proof tending to show that he was then the holder thereof, and there is no proof that the moneys thus paid ever came into the hands of the plaintiff. If the testimony of the plaintiff and her son were true, then the payments, if made, were made to Levy, after he had parted with the note to a bona fide holder for value and before maturity. The defendants may suffer in that they did not protect themselves by insisting upon the production of the note, or by some proof that Levy was then the holder thereof, but that is their fault."

This decision is also in harmony with the rule in another branch of the law — agency. It is generally true, for example, that if an agent negotiate a mortgage loan he is not presumed to have authority to receive payment therefor. However, if the principal leave the bond and mortgage in the agent's possession the mortgagor may rely on this and will be protected in paying the agent so long as the mortgage remains in his possession. He need not actually see the mortgage each time, but it must be actually in the agent's possession. As illustrating this: A, who was C's attorney, negotiated a loan to B for $10,000 on mortgage. A kept the bond and mortgage in his possession. Subsequently B made two payments of $1,000 each to A, each time seeing the mortgage in A's possession. Another payment of $1,000 was then made. This time B did not see the mortgage, but A said that he had it in his possession, which was true. After this payment A forged an assignment and delivered the mortgage to a third party. B, after such delivery, paid the rest of the mortgage to A. A absconded with all the payments. On foreclosure by C of his

Digitized by Google

$ 1500.

New York, June 4th 1905

Three months after date I promise to pay

to the order of Abraham Levy

Fifteen Hundred 00/100 Dollars

at

Value received

No. Due

Frieda Hart

Digitized by Google

Abraham Levy

The maker of this note claimed to have paid Levy to whom they had indorsed it. The testimony showed that before the time of the payment Levy had indorsed the note over to plaintiffs. The New York Supreme Court, Appellate Division, in Becker v. Hart, held that the payment to Levy did not exonerate defendant, as the plaintiffs were bona fide holders and the defendant could have protected herself by insisting on the production of the note at the time of payment.

See Decision No. 1167.

Digitized by Google

mortgage it was held on the principles above laid down that B was entitled to credit for the three payments of $1,000 each, but that he was not entitled to credit for the remainder, as at the time of payment of such remainder A did not have the mortgage in his possession and so had no apparent authority to receive payment from A. Crane v. Gruenewald, 120 N. Y. 274.

See Decision No. 1167.

Bills and Notes: Assignment Without Indorsement: Estoppel.

A note was given in consideration for money thereafter to be advanced. Before the time for the advancing of the money the note was received by plaintiff without indorsement, but for value. The plaintiff not being a holder in due course was subject to all the defenses that existed when the note was transferred. At the time of the transfer the note was valid, as there was consideration for it in the promise to advance money. Subsequently no money was ever advanced. Although not a holder in due course, plaintiff was allowed to recover, since at the time of the transfer the note was valid. The defenses to it arose afterwards, and plaintiff took it subject only to those equities existing at the time of transfer. So it was held in the case of Marling v. Fitzgerald, 120 N. W. (Wis.) 388, Decision No. 1171, which arose out of the same transaction as Marling v. Jones, Decision No. 1143.

The court said in part:

"Again the learned Circuit Court misapprehended the law in assuming, if the note would be subject to defenses as between Fitzgerald and Herman, because of the latter not having kept his agreement with the former by advancing the money, the former could, under all circumstances, including the taking of the securities for value and in good faith without negligence, from Herman, by a third person, George Ellis, and without such taking having the essential of due course, of an indorsement of the note by Herman before maturity, make such defenses as against the third person. Such a situation is not governed absolutely by the law merchant. Before it can be solved in favor of the payor of the note, the familiar principle of equity, essential to the promotion of justice, must be dealt with, that if a person, by conduct, reasonably calculated to lead another to act upon the faith thereof, and he does so act, without negligence and in such manner that he would suffer damage if the appearance created by such conduct were not warranted by the true situation, such person is precluded from taking advantage thereof to such other's injury. Whether that would apply in a case of this sort, in case of a want of consideration to support the note, or in case of its not having validity as between the original parties except upon performance of a condition precedent which is not performed, or even in case of the maker not having any reasonable ground to apprehend a probability of the

Digitized by Google

note being taken by a third person, for value, without apprehending the existence of any equities in regard thereto or being negligent in respect to the matter, need not be considered, because no such situation characterizes this case, as we have seen.

"It would seem, upon principle, that the law of estoppel ought to govern this case in favor of appellant, especially since Fitzgerald knew, or ought to have known, when he gave Herman the securities, that the latter was liable to transfer the same to another who would take the same as George Ellis did, and in the exercise of due care, having a right to believe that they were just what they appeared to be. He put Herman in a position to easily delude another in that regard, even making no restriction as to a transfer of the paper or recording of the mortgage, notwithstanding knowledge of his business. Can one do that, and then take advantage of circumstances which such other had no knowledge of, nor any reasonable ground to suspect, to such other's injury? Can one put up the bar of his own negligence and thereby save himself from loss by failure of another to perform an agreement with him, forming a full consideration of his note, and thereby effect, as to an innocent third person, a fraud to such third person's injury? It would seem that the principle of estoppel plainly arises to the contrary, so plain that illustration by reference to precedents to support such conclusions is not necessary."

See Decision No. 1171.

Digitized by Google

DECISIONS

Decision No. 1080.

FIRST NAT. BANK OF POMEROY, IOWA, v. BUTTERY.

(Supreme Court of North Dakota. February 11, 1908. On Rehearing May 22, 1908.)

116 N. W. 341.

BILLS AND NOTES — NEGOTIABLE NOTE — WAIVER OF PROTEST — EXTENSION.

The negotiable quality of a promissory note is not destroyed by a provision therein, that the makers and indorsers thereof severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice, when by its terms it is made payable on or before a day named.

Morgan, C. J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Grand Forks County; C. J. Fisk, Judge.

Action by the First National Bank of Pomeroy against J. K. Buttery. Judgment for defendant, and plaintiff appeals. Reversed.

Skulason & Skulason, for appellant. J. H. Bosard and Scott Rex, for respondent.

SPALDING, J. This is an action on a promissory note. The note was sued on by the indorsee for value before maturity, and the court found that there was a failure of consideration, and that the contract was not a negotiable note, and entered judgment for the dismissal of the action. Only one question requires consideration. If the instrument in question is a negotiable promissory note, the judgment should be reversed; otherwise, it should be affirmed.

The note was made in this State, and is payable at Sioux City, Iowa, and the clause which the trial court held rendered it non-negotiable reads: "The makers and indorsers herein, severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice." There is an apparent conflict of authorities as to whether this or similar agreements render the note non-negotiable. The note is, by its terms, made payable on or before the 1st of October, 1903. Without the paragraph complained of, it would unquestionably be a negotiable instrument, and the indorsers would be released by any extension

Digitized by Google

of time of payment without their assent. We are of the opinion that this provision does not extend the time of payment indefinitely or render it uncertain. The time of payment is already fixed.

It is strenuously argued that the use of the word "makers" in the waiver admits of an extension being made at any time on the part of the holder, by a mere secret mental process, unknown to any other party. This may be true as a psychological fact, but we do not deem it so as a matter of practice in commerce and banking. To us it is clear that it has the same effect as though the note read "on the 1st day of October, 1903, or thereafter, on demand," in which case there would be no question of its negotiability. Holders of notes do not by a secret mental process make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers. This provision seems to us to have been inserted to protect the holder against any release of indorsers or others, by an extension without their assent, and the word "makers" is evidently included to prevent any misunderstanding or misconstruction of the contract or failure to distinguish between makers, indorsers, sureties, and any other parties who might be or become liable thereon under certain contingencies as makers. 7 Cyc. 614. This phrase does not express an agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of the time renders the instrument non-negotiable.

We feel that the reasoning in the National Bank of Commerce v. Kenney, (Tex. Sup.) 83 S. W. 368, is not only satisfactory, but conclusive of this point. The note involved in that case contained this provision: "The makers and indorsers hereof hereby severally waive protest, demand, and notice of protest and non-payment in case this note is not paid at maturity, and agree to all extensions and partial payments before or after maturity, without prejudice to the holder." In holding that this provision did not render the note non-negotiable, the Texas court says: "If, as is argued, the effect of the stipulation is to give the right to the maker, without the consent of the holder, or to the holder without the consent of the maker, to appoint another date of payment, and thereby extend the time, it may be that it would render the instrument non-negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It simply makes a provision in case the time of payment may be extended. How extended? It seems to us that the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the stipulation taken as a whole was merely to relieve the holder of the paper from the burdens made necessary by the rigid requirements of the mercantile law in order to secure the continued liability of the indorsers and sureties on the paper. Therefore what was meant by the stipulation as to extension of time was simply that in case

Digitized by Google

the holder and maker should agree upon an extension the sureties and indorsers should not be discharged. The holder and maker of a note may at any time agree upon an extension; therefore, the fact that they have that right does not affect the negotiability of the paper. It is usually said that, in order to make an instrument negotiable under the law merchant, the time of payment must be certain. But a note payable on or before a certain date is negotiable. The maker of such a note has the right to pay before the date named, but the holder cannot demand payment before that date. So, in this case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that if the holder has the absolute right to demand payment at a certain date, the note is negotiable. This is but an illustration of what we understand to be the general rule. There being nothing in the stipulation under consideration, which gave any one the right to demand of the holder of the note an extension of the time of payment, we think the time at which he could demand payment was fixed, and that, therefore, it was a negotiable note."

In Capron v. Capron, 44 Vt. 410, a note which contained the provision that "if there is not enough realized by good management in one year to have more time to pay" was held negotiable. See, also, Protection Insurance Company v. Bill, 31 Conn. 534; Farmer et al. v. Bank, 130 Iowa, 469, 107 N. W. 170.

In Jacobs v. Gibson, 77 Mo. App. 244, the court held that an agreement that the time of payment might be extended without notice did not destroy its negotiability, and said: "The time of payment which is 182 days after date is certain, and if the holder exercises his option under the extension clause, and fixes another time, that time will be none the less certain. In legal effect we cannot discover that the agreement contained in the extension clause is different from that in a bill of exchange or promissory note which is payable at sight or on demand, or on or before maturity."

In Bank v. Commission Company, 93 Mo. App. 123, the court says: "The makers and indorsers agree to any extensions or partial payments before or after maturity without prejudice to the holder," and that the note according to its terms amounts to no more than an agreement that in the event of an extension of time, the holder should not be prejudiced thereby. Under this agreement the holder was given the option to extend the time of payment without thereby creating the right to defend on that ground. In the exercise of this option, the holder would still retain the right to fix the time when the note should become due. There is a plain distinction between the clause in this note, and those in most of the cases cited as authority for the contention of the respondent, and this distinction has been made by the recent Iowa case cited above. The court of that State in Farmer et al. v. Bank, supra, says: "In one branch of his argument, counsel bases a contention upon the assumption that the notes held by plaintiffs were non-negotiable, and this, because of the provision therein respecting sureties. The assumption is not warranted. As we think, the notes met all the requirements for negotiable instruments. There was no uncertainty as to the payee, the amount, or the time of payment. We may concede that in the case of an instrument providing in terms for the extension of time of

Digitized by Google

payment indefinitely, there is such uncertainty as to make the same non-negotiable. And such are the cases of Miller v. Poage, 56 Iowa, 96, 8 N. W. 799, 41 Am. Rep. 82, and Woodbury v. Roberts, 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685, cited and relied upon by counsel. But in the notes before us, we have a distinct and unqualified agreement on the part of the makers to pay on a certain date. And we perceive no good reason for holding that the negotiable character thereof is destroyed because of a clause embodied therein providing that a surety, if such there shall be, will not claim a release from his collateral liability on the instrument, if, forsooth, an extension of time shall be granted the makers without notice to him. Our attention has been called to no case so holding. As well say that where sureties, guarantors, and indorsers entitled to notice of payment, waive the requirement for such notice, the waiver must be given operation to destroy the negotiable character of the instrument. The doctrine of the courts seems to be that when the maker's promise will at some time be absolutely enforceable, and where the event on which the time and duty of payment depends is one over which the holder will have entire control, there is no such uncertainty regarding it as renders the note non-negotiable. See Protection Insurance Co. v. Bill, 31 Conn. 534, and cases cited therein. So much for authorities sustaining its negotiability.

We are, however, of the opinion that, under the plain terms of the Negotiable Instruments Act of this State, this note is negotiable, without reference to other authority.

Section 6486, Rev. Codes 1905, defines a negotiable promissory note as follows: "A negotiable promissory note within the meaning of this chapter is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or a determinable future time, a certain sum of money, to order or to bearer." Section 6309 provides that an instrument is "payable on demand. . . . 2. In which no time for payment is expressed." Section 6422 provides how such an instrument is "discharged against a person secondarily liable thereon." Paragraph 6 thereof provides that it is discharged by any agreement binding upon the holder to extend time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right to recourse against such party is expressly reserved.

If, as is contended by the respondent in the case at bar, this instrument, taken as a whole, expresses no time for payment, then, under section 6309, it is an instrument payable on demand, and according to section 6486 the negotiability of a promissory note is not destroyed by its being made payable on demand. On the other hand, if it does express a time for payment, the 1st day of October, 1903, is a fixed and determinable future time as required by section 6486, supra. This note was executed and dated within this State, and we are satisfied that the paragraph complained of as rendering it non-negotiable was drawn for the express purpose of protecting it within the terms of paragraph 6, § 6422, above quoted, and in accordance with other statutory provisions providing for waiver of presentment, notice of dishonor, and protest. Notes containing clauses similar to the one in question have been in almost universal use in this State

Digitized by Google

for years, and the identical waiver complained of has been in common use, and the instruments containing them have been regarded and treated by the trade and bankers as negotiable.

For the reasons stated, the judgment of the District Court is reversed.

POLLOCK, District Judge, concurs.

FISK, J., disqualified; Hon. CHAS. A. POLLOCK, judge of the Third judicial district, sitting by request.

MORGAN, C. J. (dissenting). I am unable to concur in the conclusion reached by my associates in this case. My reasons for reaching an opposite conclusion may be briefly stated.

The statute in express terms requires that the time of payment must be definitely stated in the note or that it can be definitely determined therefrom when it becomes payable, or it will be rendered non-negotiable. From the face of the note, it seems to me conclusive that it does not show when the note may become due and payable in view of the fact also stated therein that an extension may become operative and binding. It does not seem to me to be a sound conclusion to say that the note states a fixed day of payment when it also states that the day stated may not represent the date of payment if the stipulation as to an extension that follows is put into effect. The note cannot be said to be a demand note, as by its very terms it is not such. It fixes day of payment, subject to extensions. So far as having no fixed day of payment is concerned, the time is rendered as uncertain by reason of possible extensions as it would be if it provided for extensions indefinitely, and is therefore fairly within the principles of the Iowa cases cited in the opinion. In Bank v. Gunter, 67 Kan. 227, 72 Pac. 842, the note contained this stipulation: "The makers and indorsers hereby severally . . agree to all extensions . . . before or after maturity without prejudice to the holder," and in reference to the effect thereof upon the negotiability of the note, the court said: "In the note in question, payment is first fixed at 182 days after the date, but as will be observed, a later provision makes the time indefinite by stipulating that it may be changed and extended either before or after maturity. If the time is to remain fixed until maturity, when another time is to be fixed by the parties, or if payment is made to depend upon events which necessarily must occur, and the time of payment is ultimately certain, other considerations would arise; but here payment is not ultimately certain, for the time stated in the paper is subject to change at any time at the volition of some of the parties to the action."

In Coffin v. Spencer, (C. C.) 39 Fed. 262, the court said in reference to a similar stipulation: "Every successive taker of the paper is, of course, bound to take notice of the stipulation, and instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension of time has been made by his proposed assignor or by any previous holder."

In Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004, the court said in speaking of a like stipulation: "The holder was not bound

Digitized by Google

by the stipulation in either case to extend the time of payment. The material and controlling fact is that the holder had the option, at any time before as well as after the time of payment stated in the note, to extend to the drawers and indorsers, or either of them, the time of payment."

The following authorities specifically hold that stipulations like the one contained in the note in suit render the note non-negotiable: 7 Cyc. 600, and cases cited; Daniel on Neg. Inst. (5th ed.) 49, Eaton & Gilbert on Commercial Paper, 220; Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90; Woodbury v. Roberts, 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685; Hodge v. Farmers' Bank of Frankfort, 7 Ind. App. 94, 34 N. E. 123; Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004; Glidden v. Henry, 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; Rosenthal v. Rambo, 28 Ind. App. 265, 62 N. E. 637; Id., 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; Evans v. Odem, 30 Ind. App. 207, 65 N. E. 755; Second National Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Lamb v. Story, 45 Mich. 488, 8 N. W. 87; Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004; Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860.

On principle and authority, the note should be held non-negotiable.

On Rehearing.

SPALDING, J. This case was argued at the March, 1907, term of this court by counsel for respondent, and was submitted by appellant on its brief.

The findings of the trial court wholly failed to show on what ground or grounds it held the note in question non-negotiable. The brief of respondent discussed only the ground mentioned in our opinion, and the writer has a distinct recollection that respondent's counsel stated in his argument that, although on the trial in the District Court he had contended and believed the note to be non-negotiable for each of several reasons, on examining authorities in the preparation of his brief on appeal, he had concluded that the note was non-negotiable only on the ground referred to in our opinion. Whether such statement was made or not is, however, entirely immaterial. Respondent argued but one question either orally, or in his brief, and relied only on that as a ground for affirmance. It therefore expressly or impliedly waived all other reasons which might have been advanced to sustain the judgment of the trial court, and thereby conceded the correctness of the contention of the appellant on all except the one ground. The learned counsel who argued the case and prepared the brief for respondent has since deceased, and a petition for rehearing is presented by new counsel, who, doubtless, was unaware of what transpired on the argument, and who, in his petition for rehearing, discusses questions thus waived. Under such or any ordinary circumstances, it would be highly injudicious and unjust to now open the case for the purpose of permitting respondent to present points which were waived on the original argument. It, in effect, would be permitting the respondent to speculate on the outcome of the case, and, when defeated, to reopen it to present matters which he might have presented, but waived on the first argument.

Digitized by Google

This court has repeatedly held that the appellant waives all errors not discussed on his argument or in his brief, and we see no reason for making any distinction between appellant and respondent in such case. This view of the matter is supported by ample authority.

In this case no decisive question submitted by counsel for respondent has been overlooked by the court, and it never considered any of the reasons now alleged for holding the note non-negotiable. It was not asked to do so. It relied, as it had a right to do, upon the contention of the respondent. We are not saying that a case might not be presented where counsel had overlook points in his favor which, on being presented in a petition for rehearing, might entitle him to a reargument, but we are saying that under the circumstances of this case, it would be out of harmony with all rules intended to protect parties, and preserve their rights to permit it. See 18 Encyc. of Pl. and Pr. 37, and cases cited; also Id. 43 (d); also 3 Cyc. 214 (i).

For these reasons, the petition is denied.

Decision No. 1081.

HARMON v. OLD DETROIT NAT. BANK.

(Supreme Court of Michigan. May 26, 1908.)

116 N. W. 617.

BANKS AND BANKING — FRAUDULENT CHECK — FORGERY — STATUTES — IDENTIFICATION OF PAYEE — DUTY OF BANK — BURDEN OF PROOF — INDORSEMENT OF NAME OF FICTITIOUS PAYEE.

1. Where, in an action against a bank for paying a forged check, plaintiff, the receiver of a railroad company drawing it, proved that a trusted employee of the company had erased, or caused to be erased, with the aid of others, the name of the real payee from the voucher, had substituted the name of another as payee, and obtained the issuance of a new check to the latter, which was either a fictitious corporation or one unknown to the drawer, plaintiff established a prima facie case of a fictitious payee.

2. Comp. Laws, § 4870, provides that notes made payable to the order of the maker or to the order of a fictitious person shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer. Held, that such section was applicable only to cases where the drawer knowingly drew the check to the order of a fictititious payee, and was not available as a defense to a suit by the drawer against a bank for payment of a check which had been issued on vouchers altered by the drawer's servant without authority so as to make the same payable to a fictitious payee.

3. The duty of a bank to use due diligence in identifying the payee of a check is not changed by the time and place of a forgery of the check so as to make it payable to a fictitious payee.

4. The time and place of the forgery of a check is immaterial to the bank's liability to the maker for paying the same, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer.

Digitized by Google

5. A voucher warrant having been issued by a railroad company to a coal company in Columbus, Ohio, in payment for a coal bill, one of the railroad company's trusted employees sent the papers to Chicago, where the name and address of the payee on the voucher was changed to that of a Chicago coal company, and the altered papers being returned to the office of the railroad's auditor of disbursements, a new warrant was issued, payable to the Chicago concern. This warrant was signed and mailed to the Chicago payee, and was later cashed by a Denver bank and forwarded to a bank in Chicago, which forwarded it to a bank, which collected the same from defendant, the drawee bank, after a guaranty of prior indorsements had been made thereon; defendant taking no precautions to ascertain the identity of the payee before paying the check. Held, in a suit by the railroad company's receiver against the bank to recover the amount so paid, that the burden was on defendant in order to escape liability to show the existence or non-existence of the payee, and that the Denver bank took the proper means to identify such payee.

6. If the payee named in a check is a fictitious person, the indorsement of such name thereon by a person cashing the same is a forgery.

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Action by Judson Harmon as receiver of the Pere Marquette Railroad Company against the Old Detroit National Bank. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

The defendant was one of the general depositaries of the Pere Marquette Railroad Company. The funds on deposit were paid out upon warrants issued by the company. Its method of doing business with the bank will appear from the following statement of facts: In May, 1905, the railroad company was indebted to the Sunday Creek Coal Company in the sum of $2,097.38. Its purchasing agent prepared a voucher warrant for payment. This document was prepared on a printed blank. The first page of the document, called the "warrant," constituted the check or warrant of the treasurer of the company on the bank. The warrant as prepared by the purchasing agent reads as follows: "Pere Marquette Railroad Company, Dr., to the Sunday Creek Coal Co. (Pay W. N. Cott, Treas.), Columbus, O. Made 5/31/05, Dept. No. 6706, April. For coal per attached statement, $2,097.38." Below this were blanks for the signatures of the auditor of disbursements, comptroller, and treasurer, and for the signature of the payee upon presentation at the bank. Above the auditor's signature is the following: "I certify that this warrant is in accordance with an account approved by the proper officer and duly audited." Above the comptroller's signature are the words "approved for payment." Above the treasurer's signature is the following: "Will pay this warrant when properly dated and receipted if presented within sixty days from date stamped hereon." All the above, except the receipt of the payee, appeared upon a carbon page, called the "voucher." Instead thereof there were blanks in which to show the manner in which the amount paid should be charged upon the books of the railroad company. The purchasing agent and his clerk who prepared the papers signed their names upon the voucher, and then the original warrant and voucher, with a statement of the coal to be paid for and original invoices thereof attached,

Digitized by Google

were sent to the general manager for his approval. The general manager approved the payment by signing the voucher, and forwarded the papers to the president, who also approved the payment by signing the voucher, and then forwarded the papers to the auditor of disbursements. In the office of the auditor of disbursements the papers passed through the hands of several clerks, each of whom had some particular duty to perform in relation to them in verifying the computations, entering the transaction upon the books of the company, etc. Before the warrant had been signed by the auditor of disbursements Edwin Murdock, one of the clerks in his office, fraudulently took the papers out of the office and sent them to Chicago, where the name and address of the payee named in the voucher was changed from "The Sunday Creek Coal Co., Pay W. N. Cott, Treas., Columbus, O.," to "The G. E. Fairbanks Coal Co., Pay G. E. Fairbanks, Treas., 407 Able Bldg., Cor. 63 St. Stewart Ave., Chicago, Ill.," and the statements attached to the vouchers were changed in the same manner. The altered papers were returned by mail to the office of the auditor of disbursements, where a new warrant was prepared. This new warrant was made payable to "The G. E. Fairbanks Coal Co." to accord with the altered voucher, and when some further entries in relation to the transaction had been made the papers were, in the regular course of business, laid before the chief clerk of the auditor of disbursements for his approval. The new warrant above mentioned was signed by the auditor of disbursements without any knowledge or suspicion that the name of the payee had been changed after the voucher had been signed by the purchasing agent, general manager, and president of the company. The warrant was then sent to the treasurer of the company, who signed it, and mailed it to the payee at Chicago, at the address shown in it. The indorsements stamped upon the warrant by the different banks through which it passed indicate that the warrant was cashed by some one at a Denver bank, forwarded by that bank to a bank in Chicago, which forwarded it to the American Exchange Bank of Detroit, which collected the amount of the warrant from the defendant bank through the Detroit Clearing House after an indorsement by the American Exchange Bank of a guaranty of prior indorsements. This is all the light we have upon the history of the warrant from the time it left the office of the railroad company's treasurer. The railroad company had no contract with the G. E. Fairbanks Coal Company, never had any dealings with such a company, had never heard of the existence of such a company, and had no coal contract with any one in Chicago. The warrant came to the defendant in the usual course of business, and was paid. This suit is brought to recover the amount paid on the warrant on the ground that it was a forgery. The plaintiff requested the court to direct a verdict in his favor. This was refused, and the case submitted to the jury upon the theory that the railroad company was negligent in making and issuing the warrant, and that, where one of two parties must suffer, the loss must be borne by the one whose negligence caused it. The jury rendered a verdict of no cause of action.

Argued before GRANT, C. J., and BLAIR, MONTGOMERY, CARPENTER, and McALVAY, JJ.

Digitized by Google

Stevens, McPherson & Bills, for appellant. Henry A. Harmon (Harrison Geer, of counsel), for appellee.

GRANT, C. J. (after stating the facts as above). The facts in this case are not in dispute, and are sufficiently above stated. The conclusion to be drawn from them is that a trusted employee of the railroad company erased, or caused to be erased, with the aid of others, the name of the real payee and the substitution of another payee, and thus caused to be issued a forged warrant or voucher. The payee in the forged instrument was either a fictitious person or a real one unknown to the drawer. The plaintiff made a prima facie case of a fictitious payee. The defendant introduced no evidence that the payee was a real entity. The record is barren of any evidence tending to show to whom the payment was made by the bank in Denver, Colo., or under what circumstances it was paid. All that the record shows is that it was cashed in the Denver bank, and reached the drawee, the defendant, through other banks, and was paid by it on July 1, 1905.

As between the depositor and the bank the burden of proving payment by valid check or other voucher is upon the bank. No citation of authority is needed that he who receives money of another must account for its payment. As between the plaintiff and the defendant the question is, upon whom must the loss faill? There is no claim of bad faith on the part of either. The facts being conceded, the question is one of law. Plaintiff contends that the fraud or negligence of defendant's employee does not relieve the bank of its burden of proving that payment was made to the payee named in the warrant. Defendant insists that the officers of the company were negligent in not ascertaining that the voucher was forged; that it exercised due care in honoring it, bearing as it did the genuine signatures of the officers of the company. If the payee named in this voucher, the G. E. Fairbanks Coal Company, pay G. E. Fairbanks, treasurer, had been presented to the defendant by one claiming to be G. E. Fairbanks, the treasurer of the Fairbanks Coal Company, would the defendant have been protected in payment without any investigation to determine the identity of the presenter with the payee named in the warrant? It seems to us clear that it would not. The same rule must apply when the warrant or check is presented to it, coming through other banks. If the drawee chooses to rely upon the identification by the bank which cashed the check, it does so at its own risk, and its recourse is upon that or some intermediate bank. If the G. E. Fairbanks Coal Company was a fictitious payee, the bank cannot defend under the statute (Comp. Laws, § 4870) that the check was payable to bearer. That statute applies only to cases where the drawer knowingly draws the check to the order of a fictitious payee. Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Shipman v. Bank, etc., of N. Y., 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131; Chism v. First Nat. Bank, 96 Tenn. 649, 316 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595; 2 Bolles, Modern Law of Banking, 716; 7 Cyc. 564. In Shipman v. Bank it is said: "We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule

Digitized by Google

applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person" — citing authorities. There are authorities to the contrary in this country, but the clear weight of authority in both England and the United States is in favor of this rule. If this warrant had been changed so as to make it a forged instrument after it had been issued by the railroad company, under all the anthorities the defendant would not have been justified in paying the forged instrument. The time and place of the forgery are immaterial, unless the forgery was committed under such circumstances as to show negligence on the part of the drawer. But the drawee's duty to use due diligence in identifying the payee of the check or warrant is not changed by the time and place of the forgery. This is not the case of United States v. Nat. Exchange Bank, (C. C.) 45 Fed. 163. In that case the drawer of the check, the postmaster, went with the fraudulent payee to the bank and identified him as the payee named in the check. In that case the fault was of course with the drawer, and not with the drawee. To render that case applicable to this it should have appeared that the proper officer of the railroad company went to the bank and identified the payee. It was held in Roberts v. Tucker, 16 Q. B. 560: "That a banker cannot debit his customer with the payment made to one who claims through a forged indorsement, and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position so as to preclude the customer from showing it to be forged." It is held in Murphy v. Metropolitan Nat. Bank, supra: "The ordinary rule is well established that a banker on whom a check is drawn must ascertain at his peril the identity of the person named in it as payee. It is only when he is misled by some negligence or other fault of the drawer that he can set up his own mistake in this particular against the drawer" — citing authorities.

In this case the defendant took no precautions before paying the warrant to ascertain the identity of the payee. It did not show that it paid the warrant to the payee named therein. It evidently relied upon the identification made by the bank in Denver, Colo., where the warrant was cashed, and whether that bank took the requisite precaution we do not known. It would naturally excite suspicion that a check drawn in Detroit, payable to a corporation in Chicago, on a bank in Detroit, should be presented to a bank in the distant city of Denver. It was clearly the duty of the Denver bank to take proper means to assure itself that it was paid to the proper party; in other words, to take proper means to identify the payee. 2 Morse on Banking, § 466 (b); Ellis & Morton v. Ohio Life Ins. Co., 4 Ohio St. 628, 64 Am. Dec. 610. The court in that case said: "Where negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of parties, or the course of business devolved upon the

Digitized by Google

holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument." The negligence of the Denver bank is imputable to the defendant. In Graves v. American Exchange Bank, 17 N. Y. 205, a draft was sent payable to order of Charles F. Graves. It reached a person in the same place by the same name, and by him was indorsed and paid by the drawee. It was held that the payment, although made in good faith, did not divest or impair the title to the true owner who had not seen or indorsed the paper. It was held in fact to be a forged indorsement. It was held in Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun (N. Y.) 475, 27 N. Y. Supp. 1070, that it is the signature of the payee that transfers title to a check; that the signature of another person by the same name as the one to whom it was drawn is just as much a forgery as if the names had been different. It is the signature of the payee that transfers title to the check. A similar holding is in Indiana Nat. Bank v. Holtsclaw, 98 Ind. 85. It was held in First Nat. Bank of Chicago v. Pease, 168 Ill. 40, 48 N. E. 160, that the fact that the drawer of a check delivers it to a party representing himself as the payee's agent, without investigating the alleged agent's authority, is not such negligence as will relieve the bank from liability for the payment of the check on a forged indorsement of the payee's name by the alleged agent.

If the payee named in the paid warrant was a fictitious person, the indorsement in the name of such fictitious party is in effect a forgery. Hatton v. Holmes, supra. If the G. E. Fairbanks Coal Company and G. E. Fairbanks, treasurer, were fictitious parties, the indorsement was a forgery. If they were real parties, the indorsement by any other without authority would be a forged indorsement, and would not excuse defendant's payment. It was incumbent upon it to show the existence or non-existence of such a payee, and that the Denver bank took the proper means to identify the payee. It failed to sustain this burden, and therefore the verdict and judgment are set aside, and a new trial ordered.

Decision No. 1082.

ELGIN CITY BANKING CO. v. HALL et al.

(Supreme Court of Tennessee. October 19, 1907.)

108 S. W. 1068.

BILLS AND NOTES — VALIDITY — FRAUD — BONA FIDE PURCHASERS — NOTICE — GUARANTY — REMEDIES OF CREDITORS — CONDITIONS PRECEDENT — PURCHASERS FOR VALUE — "VALUE" — EVIDENCE — BURDEN OF PROOF.

1. The seller of a horse represented to five of the buyers that three other persons had become equal partners in the purchase. The seller had secretly arranged with the three persons to pay them a consideration for the use of their names as buyers and to release them from the payment of the purchase money. Held, that the note executed by the five individuals for the price was procured by fraud, and was not enforceable as between the original parties.

Digitized by Google

2. Under Acts 1899, p. 148, c. 94, § 38, providing that an indorsement of a note without recourse does not impair the negotiable character of the instrument, and independent of the act, an indorsement of a note without recourse is not sufficient to put the purchaser on notice.

3. Where the guaranty of a note is absolute, no demand or exhaustion of the maker is required, nor any notice required of acceptance or default.

4. Whether a guaranty of a note stipulates that the maker will pay, or whether it stipulates that the guarantor will pay, the undertaking is absolute, whether the maker is solvent or not, and the guarantor may pay or see that it is paid.

5. A bank, discounting a note and crediting the amount thereof on the indorser's account, without paying to him any value, is not a bona fide purchaser for value, since the proceeds of the discount may be credited to the bank by making a change of entry on its books.

6. A purchaser of commercial paper is a holder for value and in due course of trade where he has given for the paper his money, goods, or credit at the time of receiving it, or has on account of it sustained some loss or incurred some liability.

7. Under Acts 1899, p. 146, c. 94, § 25, providing that "value" is any consideration sufficient to support a simple contract, a bank discounting a note and obtaining credit in favor of the indorser in a solvent bank for the amount of the discounted paper is a holder for value.

8. A bank purchased a note from the payee. The cashier thereof testified on direct examination that the bank purchased the note, with others, from the payee, and paid therefor the full amount of the notes, with interest to date of purchase, in the usual course of business. On cross-examination he testified that he gave the payee credit for the amount at another bank. It was not shown how the credit was given, or that it was ever used by the payee. Held, that the bank was not a holder for value.

9. In an action by an indorsee of a note against the makers, defended on the grounds that the note had been procured by the fraud of the payee and that the indorsee was not an innocent purchaser for value, the indorsee has the burden of proving that it was a holder for value.

Appeal from Chancery Court, Bradley county; T. M. McConnell, Chancellor.

Suit by the Elgin City Banking Company against J. T. Hall and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Wheeler & Trimble, for appellant. Mayfield & Mayfield, for appellee Hall.

McALISTER, J. This bill was filed by the Elgin City Banking Company, a corporation chartered under the laws of the State of Illinois, and having its situs and principal place of business at Elgin, in said State, against the defendants, who are all residents of Bradley county, Tenn., for the collection of two promissory notes, together with the accrued interest. Complainant claims to be an innocent holder of said notes, and purchased them before maturity, in due course of trade, without notice of any outstanding equities against them. A copy of one of said notes, together with the indorsements thereon, is in the words and figures following, to wit:

Digitized by Google

"400.00 Cleveland, Tenn., Oct. 1st, 1903.

"On or before the first day of September, 1905, for value received, we jointly and severally promise to pay to the order of Dunham, Fletcher & Coleman, of Wayne, Ill., four hundred dollars ($400.00), payable at the Cleveland National Bank, with interest at 5 per cent. per annum, payable annually from date, until paid.

"Jeff Hall.
"C. T. Carroll, Jr.
"L. L. Callaway.
"L. P. Sullivan.
"T. J. McKamy.
"Edward H. Thurston."

"Pay to the order of W. S., J. B. & B. Dunham, without recourse to us.

Dunham, Fletcher & Coleman."

"W. S., J. B. & B. Dunham."

"For value received, we hereby guarantee, the payment of the within note at maturity, or at any time thereafter, with interest at 5½ per cent. per annum until paid, and we agree to pay all the costs and expenses paid or incurred in collecting the same, hereby waiving demand of payment and notice of non-payment.

"W. S., J. B. & B. Dunham."

Defendants answered the bill, in which they admitted the execution of the notes, but denied that complainant is an innocent purchaser of said notes, for value, and in due course of trade. It is averred that said notes were procured by fraud and misrepresentation on the part of Dunham, Fletcher & Coleman, the payees; and as a further defense it is averred that the consideration for said notes has wholly failed.

The more specific averments of the answer are that the notes in suit represented in part the purchase price ($1,600) of a certain horse; that at the time of said purchase the payees, Dunham, Fletcher & Coleman, delivered to respondents a written statement or guaranty of the soundness of said animal, and that he possessed all the qualities represented by the seller, but on delivery of the horse it was soon ascertained that he was stump sucker and did not in any respect possess the qualities guaranteed by said seller. When said facts were communicated to the seller, said firm agreed to receive back the horse, and agreed with two of the purchasers to ship another horse to Cleveland in place of the first, which was accordingly done. It is then averred that the second horse was of a notoriously diseased breed of horses, and was not only thus diseased, but was not up in other respects and qualities to the warranty of the seller, all of which facts were fraudulently concealed from the purchasers. It is then averred that the second horse so shipped to Cleveland died within about two months after his arrival, as a result of his diseased condition at the time he was shipped; and respondents aver that said sellers, as horse dealers, must have known of the diseased condition of this horse, but fraudulently concealed the same from respondents.

It is further averred that the agent of the payee of said notes, at the time the defendants agreed to purchase the horse, made secret and fraudulent contracts with certain of said purchasers, in whose judgment as horsemen defendants had confidence, whereby said parties were induced to represent themselves as willing to enter into said purchase as equal partners, and pretended to join with defendants as purchasers, and also pretended to pay or become liable for said

Digitized by Google

sum of $200 each for a one-eighth interest in said horse, for the fraudulent purpose of inducing defendants to enter into said contract; whereas, in fact, neither of the parties to said secret contract contributed said sum of $200, but by the agreement with said seller were either paid large sums in cash, to wit, from $50 to $100, or were given a one-eighth interest free of charge, to have them passed as equal partners or purchasers, and induce defendants to enter into said contract and become liable for said purchase money.

It is averred that the purchase by each of the said eight alleged purchasers was a material part of the consideration for said purchase by all the other purchasers. Defendants, therefore, aver that, because of the fraud, misrepresentations, and concealments on the part of the payees in procuring said contract and notes, and because of said failure of consideration, they are not liable to complainants for the amount of said notes or other sum.

It appears that the notes in question were indorsed by the payees, Dunham, Fletcher & Coleman, to another firm, of which W. S. Dunham was a member, and by that firm transferred before maturity to complainant bank. It is claimed by the complainant that it had no notice of any equities existing against the notes. The complainant bank claims to have purchased the notes by placing the amount paid for them to the credit of W. S., J. B. & B. Dunham (the second indorsers, for whom the notes were discounted) in the First National Bank of Elgin, Ill., a different bank from complainant, which is the Elgin City Banking Company, as already stated.

Proof was taken, and on the hearing the chancellor was of the opinion that the complainant did not give value for the notes; he holding that the defenses alleged were good against the original payee and therefore good also against the complainant. The chancellor was of opinion that the complainant was not an innocent holder of the paper and that the defense set up in the answer had been established by the proof, and he accordingly dismissed the complainant's bill. The complainant appealed, and has assigned errors.

The first inquiry naturally arising is whether there was fraud in the original inception of this contract, for which the notes in question were executed in part fulfillment.

It is shown on the record that one Campbell, the agent of the payees, Dunham, Fletcher & Coleman, brought the first horse in question to Cleveland, and having failed to sell him, proposed to six of the defendants to purchase the horse for $1,600, as equal partners. It is shown by the proof that said agent stated to the defendant E. H. Thurston that several others would join in the purchase if Thurston would become interested, and proposed that Thurston should hold himself out as a purchaser and affect to pay said sum of $200 with the others, but he should pay only $100, and the remaining $100 would be repaid to him; and it is shown that Thurston, under this secret contract, did thereafter pretend to join with the others as an equal partner in said purchase. It is also shown that said seller approached one M. L. Beard, of Cleveland, an old and experienced dealer in horses, and on whose judgment the other purchasers relied, and proposed that said Beard should also become a colorable purchaser, and should receive a one-eighth interest in said horse gratis, if he would profess to join in said purchase; and under this agreement Beard did thereafter pre-

Digitized by Google

tend to be a bona fide purchaser, and permitted the seller to so represent him. The seller not only represented Beard as one of the purchasers, but some of the other purchasers were referred to him for his judgment as to the merits of the horse.

It is also shown that said agent agreed with J. T. Hall, another of said purchasers, to pay said Hall the sum of $50 for his services in inducing the others to join in said purchase. It is shown that none of the other purchasers knew or suspected these secret and fraudulent contracts had been made, but supposed that all the others were entering into the purchase on equal terms of partnership. It was represented to the five purchasers who received no secret consideration that seven others had agreed to join, and that it was only necessary that he agree to join to complete the purchase. It is further shown that when the eight purchasers met with said seller to complete the purchase and sign the notes for the purchase money, Thurston and Hall, at the request of the seller, signed the notes with the others, and the seller then secretly paid to them in cash the sums of $100 and $50 respectively, according to their secret arrangement. The seller also desired said Beard to sign said note and receive $200 in cash; but Beard objected to this, and it was thereupon announced to the others that Beard was paying his part of the purchase money to said seller in cash, but in fact nothing was paid by him. It is shown that one of said purchasers, G. W. Day, paid the seller the sum of $200 in cash, and this, with the $200 alleged to have been paid by said Beard, left a balance of $1,200, and for this sum the six defendants executed three notes, each for $400, due, respectively, on or before September 1, 1905, 1906, and 1907, with interest at 5 per cent., payable annually. It is also shown by the proof that, while the agent made many representations and warranties as to the soundness and fine breeding qualities of the animal, he carefully kept the horse in a locked box stall before the sale, where he could not be seen, except when taken out by the seller for inspection; but within a few days after the purchase it was discovered that the animal was unsound. When the seller was notified of this, he took back the horse and sent another in exchange. This new contract was negotiated by Thurston and Hall, two of the alleged purchasers, who had been secretly paid to enter into the original contract. The second horse, as already seen, died about two months after he was received.

We think, upon the facts shown in the evidence, that this contract and these notes were not enforceable against the original makers, on account of the fraud and misrepresentation practiced by the agent of the payees, Dunham, Fletcher & Coleman.

The question remains whether the complainants were innocent purchasers of said note for value, before maturity, in due course of trade, without notice of any of the infirmities in said notes.

As already seen, said notes were first indorsed "without recourse" by Dunham, Fletcher & Coleman, the payees, to W. S., J. B. & B. Dunham, and said notes were then delivered to complainant bank by said W. S., J. B. & B. Dunham under a written guaranty on the back of the notes, by which said firm guaranteed the payment of said note, with interest at 5½ per cent. per annum, together with all the costs and expenses of collection, and also waived demand and notice of nonpayment.

Digitized by Google

It is suggested that the indorsement "without recourse" was sufficient to put the purchaser upon notice, and destroyed the negotiability of the instrument; but we think it is well settled that an indorsement without recourse is not sufficient to put the purchaser upon notice. 2 Randolph, Commercial Paper, § 1008; 7 Cyc. 954, and numerous cases cited.

Moreover, the matter is set at rest by our Negotiable Instruments Law (Acts 1899, page 148, c. 94, § 38), wherein it is provided that "such an indorsement does not impair the negotiable character of the instrument."

Again, it is insisted that complainant bank holds another indorsement or guaranty by which the guarantors agree to guarantee payment of the note at a different and higher rate of interest than the note bears, and also guarantee payment of all expenses of collection, whereas the notes themselves contained no such provision.

It has been observed that the notes bear interest at 5 per cent., while the guarantors agreed to pay interest at 5½ per cent. It is argued that this is a new, independent, and different contract, and not merely a transfer of the notes. It is conceded that many of the authorities hold that a mere guaranty of a note will constitute the purchaser an indorsee, within the rule protecting an innocent holder; but it is insisted that this rule cannot apply to a guaranty changing the rate of interest and also agreeing to pay expenses of collection. It is argued that, if this can be done without destroying the negotiability of the paper, then each indorsee can, of course, change the rate of interest or the amount of the note, and each be liable for a different amount.

It is unnecessary to decide this question, since it appears that the notes were indorsed in blank by W. S., J. B. & B. Dunham, and the guaranty did not, of course, nullify their prior blank indorsement.

In Elgin City Banking Co. v. Zelch, 57 Minn. 487, 59 N. W. 544, the indorsements were:

"Pay Elgin City Banking Co. D. Dunham."
"Payment guaranteed. D. Dunham."

The court said:

"Whether these indorsements be construed as constituting a single contract, or two separate and distinct contracts, we are clear that they constitute indorsements in the commercial sense, and that the transferee is an indorsee, and entitled to protection as such under the law merchant. The fact that Dunham enlarged his responsibility beyond that of an indorser by guaranteeing payment did not change or affect the character of his indorsement."

In Cover v. Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394, it is held that a guaranty added to an indorsement is not notice of defenses. Louisville Trust Co. v. L., N. A. & C. R. Co., 75 Fed. 433, 22 C. C. A. 378.

The determinative question presented on the record is whether the complainant bank is a holder for value. Our Negotiable Instruments Law (section 25) provides:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is demed

Digitized by Google

such whether the instrument is payable on demand, or at a future time."

"Sec. 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face.

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.

"(3) That he took it in good faith and for value.

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument, or defect in the title of the person negotiating it."

"Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act, when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

"Sec. 56. To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

"Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses, available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

"Sec. 59. Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person, under whom he claims acquired the title as a holder in due course."

While we find some facts and circumstances in the record tending to show that complainants were put on inquiry as to defenses against this note, we cannot say that complainants "had actual knowledge of the infirmity or defect or knowledge of such facts that its action in taking the instrument amounted to bad faith."

It is matter for observation that at the time of purchasing this paper the officials of the complainant bank made no inquiry in respect of the makers or as to the consideration of the notes, although it is admitted they knew nothing as to the commercial standing or solvency of the makers.

Again, it appears that in enforcing the collection of the notes complainant has ignored the guarantors and is only suing the original makers. This is worthy of comment, since the guaranty was for the payment of all expenses of collection and additional interest. It appears the guarantors are solvent and reside within seven miles of complainant's place of business, and yet, passing them, complainant sent this paper to Cleveland, Tenn., for collection, thereby seeking

Digitized by Google

a lower rate of interest and incurring attorney's fees in the prosecution of the suit. There was no obstacle in the way of a primary suit against the guarantors on this form of guaranty. It is well settled in Tennessee that, when the guaranty is absolute, no demand or exhaustion of the maker is required; nor is any notice required of the acceptance or default. It does not matter whether the guaranty stipulates that the maker will pay, or that the guarantor will pay, nor whether the maker is solvent or not. In either event, the undertaking is absolute, and the guarantor may pay the amount, or see that it is paid. This is not the case of a guaranty of solvency or collectibility, which requires previous demand and suit. Klein v. Kern, 94 Tenn. 34, 28 S. W. 295, and authorities there cited.

The only explanation of this unbusinesslike procedure on the part of complainant bank is that the firm of guarantors did a valuable business with the bank and that complainant would do anything to protect them.

The main proposition presented by counsel for defendants is that complainant is not a holder of said paper for value within the meaning of our Negotiable Instruments Law. It is said it is not shown that complainant has ever paid anything in money, or the equivalent, for said paper; but the cashier of the bank merely testifies that he gave said firm "credit for the amount at the First National Bank of Elgin." It is said it is not shown that said credit was ever used by said indorsers, W. S., J. B. & B. Dunham. The entire testimony on this subject is found in the deposition of A. C. Hawkins, cashier of the complainant, Elgin City Banking Company. He tells of the purchase of said notes, together with sundry other notes, in one lot, from W. S. Dunham, of the firm of W. S., J. B. & B. Dunham, paying therefor the full amount of said notes, with accrued interest to date of purchase, at said bank, in the usual course of business. This was the testimony of the witness on his direct examination, from which it appears that a prima facie case of a holder for value is made out; but, on cross-examination of the witness at a later date, he was asked: "Q. 4. Do you recall how you paid for them [referring to the notes]?" and he answered, "I gave them credit for the amount at the First National Bank of Elgin on the 18th day of July, 1904." It will be observed that the alleged credit was not given in the bank which purchased the notes (the complainant, Elgin City Banking Company), but at a different bank, namely, the First National Bank of Elgin, Ill

The law seems to be settled that, when a bank simply discounts a note and credits the amount thereof on the indorser's account, without paying to them any value for it, it is not enough to constitute such bank a prima facie purchaser for value of the note. Selover, Neg. Inst. Laws, page 217; 2 Am. & Eng. Encyc. of Law, 391, 392; Warman v. First Nat. Bank, 185 Ill. 60, 57 N. E. 6, 49 L. R. A. 412.

The reason is that the proceeds of the discount may be credited to the bank by making a change of entries on its own books. It is said, however, that this rule of law has no application where the credit to the seller of negotiable paper is given by the purchaser, not on its own books, but in a different bank. It is said the presumption must be, in such case, that the purchaser has paid money, surrendered securities, released an obligation, or itself assumed an obligation in the other bank, in order to secure this credit. The record fails to

Digitized by Google

show why payment of the notes was made in this manner, nor the precise nature of the transaction by which the complainant bank secured credit to the seller in the First National Bank of Elgin for the amount of these discounted notes.

It is well settled that a purchaser of commercial paper is a holder for value and in due course of trade, when he "has given for the note his money, goods, or credit, at the time of receiving it, or has on account of it sustained some loss or incurred some liability." Nichol v. Bate, 10 Yerg. 429; Kimbro v. Lytle, 10 Yerg. 417, 31 Am. Dec. 585; Bank v. Johnson, 105 Tenn. 521, 59 S. W. 131.

As already seen, by section 25 of our Negotiable Instruments Law (Acts of 1899), it is provided: "Value is any consideration sufficient to support a simple contract." There is no trouble, therefore, in holding that, if the complainant bank had obtained credit in favor of the seller in a solvent bank for the amount of the discounted paper, that would be a sufficient consideration to constitute the purchaser a holder for value.

The difficulty presented arises out of the indefiniteness of the testimony. The witness was not asked by counsel on either side for an explanation of his statement, "I gave them credit for the amount at the First National Bank of Elgin." It does not appear from the record that this credit was ever used by W. S., J. B. & B. Dunham. It does not appear how the credit was given, and the court cannot determine, from the unexplained statement of the witness, whether or not the credit was real and substantial. The burden of proof is on complainant to show, on these facts, that it was a holder for value.

The fraud that vitiated the original transaction was the conduct of the agent, Campbell, in representing to five of the purchasers that Beard, Hall and Thurston had become equal partners in the purchase of the horse, when this agent had secretly arranged with these three parties to pay them a consideration to allow the use of their names as purchasers and to release them from the payment of their quota of the purchase money.

Decision No 1083.

WATTS MERCANTILE CO. v. BUCHANAN et al.

(Supreme Court of Mississippi. April 13, 1908.)

46 So. 66.

CORPORATIONS — PURCHASE OF PROPERTY — ACTIONS FOR PRICE — LIABILITY.

1. A corporation received the proceeds of a purchase by it of property, and gave a note, signed in its name by its general manager, for the price. It made partial payments on the note. Held, that the corporation could not defeat a recovery on the note on the ground that the general manager was without authority to execute it.

2. Under Acts 1900, p. 127, c. 88, § 5, imposing a penalty on a corporation purchasing any part of the capital stock of another corporation, a corporation purchasing from an individual his interest in another corporation cannot defeat payment of the price by pleading that the transaction was ultra vires, where it holds the property bought.

Digitized by Google

Appeal from Circuit Court, Jones county; D. M. Miller, Judge.

Action by J. A. Buchanan and others against the Watts Mercantile Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. R. Harper, for appellant. Pack & Montgomery, for appellees.

CALHOON, J. Mr. Buchanan brought this suit against the Watts Mercantile Company on a promissory note for $200; the note itself reciting that it was "for his entire interest in the Elberta Hoop Company." This note was given before the Code of 1906 took effect. The note was signed, "Watts Mercantile Company, per S. Q. Donald." Two defenses are set up — the one being that S. Q. Donald had not been authorized by the Watts Mercantile Company to make this purchase, and the other that the whole transaction was ultra vires, in that it involved a purchase by the Watts Mercantile Company, which was a corporation, of an interest in the Elberta Hoop Company, which was also a corporation. If the transaction was intra vires, it is idle in this case to talk about Donald not having the power to sign the note for the Watts Mercantile Company. He was the general manager of that corporation, and that corporation got the benefit of the purchase. There were but three stockholders in that corporation, and Donald was one of them; and besides, which is absolutely conclusive, it appears that that corporation got the proceeds of the purchase, and in fact made payments on that note to the amount of $120. This payment was a ratification as pronounced as any ratification could be.

In examining the question as to whether or not this contract was ultra vires, it must be borne in mind that Mr. Buchanan was a private individual. He simply sold his interest to the Watts Mercantile Company, which corporation, it is shown, had been part owner and stockholder in the Elberta Hoop Company, and when it bought from Buchanan it practically owned the Elberta Hoop Company. We are thus drawn to consider the bald proposition whether a corporation, which makes a purchase which it is poweless to make from a private individual who has the power to sell, can set up its own ultra vires to defeat payment, and at the same time hold onto the stuff it got in the contract. The point is made here that, granting all this, still the case should be reversed, because the action was on the note, and not on a quantum valebant; and in support of this the case of Fairly v. Nash, 70 Miss. 193, 12 So. 149, is cited. If this decision applied, and if it would have governed at the time it was delivered, which we do not decide, it could have no force, because it was delivered before section 147, Const. 1890, was in force.

The only color of defense on the doctrine of ultra vires must be derivable from Acts 1900, page 127, c. 88, § 5, which is in the following words: "Sec. 5. No corporation shall directly or indirectly purchase or own the capital stock, or any part thereof, of any other corporation; nor directly or indirectly purchase, or in any manner acquire the franchise, plant or equipments of any other corporation, if such other corporation be engaged in the same kind of business and be a competitor therein. Any corporation offending against this provision shall forfeit its charter, if a domestic corporation, and if a foreign corporation, shall forfeit its right to do business in this State, and shall

Digitized by Google

be proceeded against by the attorney-general in manner and form provided in section 4 of this act." It will be noted that this statute forbids the purchase by one corporation of the capital stock of another, or to acquire the franchise, plant, or equipment of any other corporation. The penalty it inflicts is that the corporation so purchasing shall forfeit its charter and shall be proceeded against by the attorney-general. It might be enough in the case before us to say that the penalty denounced is against the purchasing corporation, and that it would have to be stretched to cover a case as against an individual seller.

However, we need not bother about this, but prefer to plant ourselves, in the particular case before us, on the decisions of various courts, notably, New York, Massachusetts and Wisconsin, and on the language of the New York court that "that kind of plunder which holds onto the property, but pleads the doctrine of ultra vires against the obligation to pay for it, has no recognition or support in the laws of this State." We refer to 2 Cook on Corporations, page 1608, and notes. We subscribe to that doctrine in the particular case we have in hand, and, if it be true that the federal courts would hold differently, we respectfully decline to follow them; but we do not think it would be so held in the federal courts on the facts of the case at bar. The view we have taken of this case does not at all affect the advisory opinion in Woodberry v. McClurg, 78 Miss. 836, 29 So. 514, which case had reference to the propriety of a charter being approved by the attorney-general, which charter expressly authorized the purchase of the stock in other corporations.

Affirmed.

Decision No. 1084.

HUSTON et al. v. NEWGASS et al.

(Supreme Court of Illinois. April 23, 1908. Rehearing Denied June 3, 1908.)

84 N. E. 910.

PARTNERSHIP — RIGHTS AND LIABILITIES AS TO THIRD PERSONS — APPEAL — QUESTIONS NOT RAISED BELOW — BILLS AND NOTES — REQUISITES — ACCEPTANCE — LIABILITY OF ACCEPTOR.

1. In an action to recover the amount of a draft drawn by two partners on defendants, and cashed by plaintiffs, it appeared that defendants agreed to honor, until further notice, drafts drawn on them by the partners for horses shipped to defendants, but refused to honor the draft in question because drawn by one of the partners only after the dissolution of the firm. There was some evidence that before the draft was drawn one partner notified the other of his withdrawal from the partnership, but it was not claimed that plaintiffs knew of the firm's dissolution, and the evidence was conflicting as to whether defendants, when they received the horses for which the draft was drawn, knew of the dissolution. Held, that it was error to refuse to charge that each partner in a commercial partnership has power to bind the other partner in dealing with third persons within the scope of the partnership

Digitized by Google

until notice given of the dissolution of the partnership, and that a notice of dissolution, given by one partner to the other, has no effect upon the rights of third persons dealing with the partnership without notice of the dissolution, and, further, that such a notice was inoperative as to all persons with whom the partnership had been doing business prior to the dissolution unless those persons had knowledge of the dissolution.

2. The draft was drawn for a considerable amount more than was required to pay for the horses shipped. The suit was brought, however, to recover the correct amount, one of the counts of the declaration containing averments of a credit of the overcharge upon the draft as originally drawn. It does not appear that defendants based their refusal to honor the draft on the ground that it was drawn for an excessive amount, or at any time signified a willingness to pay the correct amount. Their refusal was based solely on the ground that the partnership was dissolved before the draft was drawn, and that it was the draft of one of the partners and not of the firm. Held, that defendants could urge for the first time on appeal that they were justified in refusing to honor the draft because of the overcharge.

3. The acceptor of a bill of exchange becomes primarily liable for its payment and is to be considered the principal debtor, and this is true, even if the acceptance was for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it.

Dunn, J., dissents.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook county; M. Kavanagh, Judge.

Action by John Huston and others against Louis M. Newgass and others. From a judgment of the Appellate Court affirming a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This is an appeal from a judgment of the Appellate Court affirming a judgment of the Superior Court of Cook county. The action was assumpsit, brought by appellants against appellees, to recover an amount claimed to be due on a draft drawn by Grindell & Dainty on appellees, upon which draft the cash was advanced to the drawers by appellants. We adopt, in part, the statement of the Appellate Court as to the facts: "Plaintiffs were in 1904 bankers at Blandinsville, Ill., and defendants then were engaged in selling horses on commission at the Union Stock Yards, Chicago. In March of that year Isaac Grindell went to Blandinsville and engaged in the business of buying horses in that vicinity and shipping them to the Union Stock Yards to be sold. He opened an account in his own name with plaintiffs. April 1st he applied to plaintiffs to discount his draft for $2,500 on defendant. In answer to a telegram from plaintiffs, defendants telegraphed them as follows: 'We will pay draft Isaac Grindell $2,500 for horses shipped to us.' Grindell drew a draft for that sum April 5, 1904, to the order of plaintiffs, which was discounted by them and paid by defendants. About this time John Dainty became a partner of Grindell. Grindell soon after April 5th informed plaintiffs that Dainty had gone into business with him, and plaintiffs wrote in Grindell's passbook, over his name, the words 'Grindell & Dainty.' A few days before April 15th plaintiffs wrote defendants that they wished a letter stating absolutely that they would honor all drafts drawn by Grindell & Dainty, and in answer, under date of April 15th, defendants wrote plaintiffs as follows: 'We will honor drafts drawn

Digitized by Google

by Dainty & Grindell, drawn on us for horses, until further notice.' Grindell, for his firm, bought several car loads of horses in April, May and June in the vicinity of Blandinsville, and shipped them to defendants to be sold. Before paying for each lot of horses so bought, he drew, in the name of the firm, a draft on defendants to plaintiffs' order, which the plaintiffs discounted, placed the proceeds to the credit of said firm, and paid the same out on checks drawn by Grindell in his own name. The course of business between Grindell & Dainty and the defendants was for Grindell to go into the country, buy horses, pay a small amount down on each horse, fix a date for the delivery of the horses at Blandinsville, and payment of the remainder of the purchase price. Before going out he would sign a draft in the name of his firm on defendants, payable to the order of plaintiffs, with the date and amount left blank. When he had bought a car load of horses he would direct plaintiffs to fill out a draft for a certain amount, and they would then fill out the draft and send it forward for collection. All the drafts so drawn previous to July were paid by the defendants."

Prior to July 1, 1904, nine shipments were made by Dainty & Grindell, for which drafts were drawn on appellees. The cash on all these drafts was advanced Grindell & Dainty by appellants, who forwarded the drafts for collection to their correspondent in Chicago, and they were paid by appellees. The shipment out of which this controversy arises was made about July 20, 1904, and on July 21st a draft on appellees for $3,300 was drawn. That amount of money was placed to the credit of Grindell & Dainty by Appellants, to be checked against for the payment of the horses, and the draft was forwarded in the usual course of business for payment by appellees. By a mistake the draft was made for $1,000 more than it should have been. One of the appellants testified that Grindell telephoned the amount the draft was to be drawn for, and on account of his not speaking plainly or some confusion on the wires they understood him to say $3,300. The correct amount was $2,300. The draft was not presented to appellees until the day after the horses arrived, and after they had been sold. They refused payment, and the draft went to protest. Upon learning the draft had been made $1,000 too large, and that amount of money remaining in the bank to the credit of Grindell & Dainty, appellants charged their account with that amount and credited it upon the draft, and brought this suit to recover the balance. The cause was tried before the court without a jury, and resulted in a judgment for appellees, which judgment has been affirmed by the Appellate Court, and a further appeal prosecuted to this court.

Wendell Huston and M. Henry Guerin, for appellants. Newman, Northrup, Levinson & Becker, Harry Goodman, and Chester E. Cleveland, for appellees.

FARMER, J. (after stating the facts as above). The defense interposed by appellees was that they would accept and pay drafts drawn on them by Grindell & Dainty for horses shipped, but that the draft sued on was not drawn by Grindell & Dainty, as said firm had been disolved before said draft was drawn. The buying and shipping was attended to chiefly by Grindell. Dainty resided in Chicago and officed with appellees. He testified that about the latter part of June he wrote Grindell not to buy any more horses on his or on his and

Digitized by Google

Grindell's account, and that thereafter he had nothing further to do with Grindell in buying and shipping horses. He kept no copy of the letter and received no acknowledgment of its receipt from Grindell. He did not say whether he informed appellees of the dissolution of the partnership or not. One of the appellees, Max J. Newgass, testified that at the time the horses arrived in Chicago he knew the firm of Grindell & Dainty had been dissolved, but does not state from whom or when he received the information. No notice was given appellants of the dissolution by either Dainty or appellees, and it is not claimed that they had any knowledge of such dissolution. According to the evidence it must have been after June 27th that Dainty wrote the letter dissolving the partnership, if it was dissolved. Grindell continued the same business in the same manner and under the same firm name as he had previously been doing, and appellants were in utter ignorance of any change in the firm.

Appellees claimed they knew, at the time the last shipment of horses was made, the firm of Grindell & Dainty had been dissolved. How long they had known it before that time was not stated. They offered in evidence a letter from Grindell dated July 20th and addressed to "Mr. Newgass." The letter stated the writer had shipped fourteen head of horses, and requested that when sold the profits be sent to him, "as Dainty told me he didn't want any more to do with shipping horses." This letter, according to the testimony, was received by appellees about two hours after the horses had arrived, so that if they knew of the dissolution at the time the horses arrived they did not get their information from this letter, and it is not probable they received such information from Grindell at any previous time, for he was doing business in the firm name the same as if there had never been a dissolution. The only persons testifying who did know of the dissolution were Dainty and appellees. Appellants asked the court to hold as propositions of law that each partner in a commercial partnership has power to bind the other partner in dealing with third persons within the scope of the partnership until notice given of the dissolution of the partnership, and that a notice of dissolution given by one partner to the other has no effect upon the rights of third persons dealing with the partnership without notice of the dissolution; also, that notice of dissolution given by Dainty to Grindell was inoperative as to all persons with whom the firm of Grindell & Dainty had been doing business prior to the dissolution, unless those persons had knowledge of the dissolution. These propositions were refused, and in this we think the court erred. Here the firm of Grindell & Dainty was a trading partnership, and either of the partners had the right to sign the firm name to obligations or negotiable paper within the legitimate scope of the partnership business. It would harly be denied that if Grindell had signed the firm name to a promissory note payable to appellants at the time he signed it to the draft the firm would have been liable in an action to recover on the note. Under the circumstances disclosed by the evidence in this case, appellants were warranted in dealing with Grindell as a member and representative of the firm. Appellees had some acquaintance with Grindell but were unwilling to extend their credit to him alone. They were well acquainted with Dainty and sustained close relations with him, and their agreement to accept and pay drafts drawn by Grindell & Dainty

Digitized by Google

was on account of their knowledge of and faith in Dainty. This, together with the profits they expected to derive from commissions on the sales of horses shipped them by Grindell & Dainty, induced them to agree with the appellants to pay their drafts. But for this agreement of appellees, appellants would not have furnished the money to Grindell & Dainty to pay for the horses. Appellees' agreement was to honor the drafts drawn on them by Grindell & Dainty for horses until further notice. It would seem consonant with both reason and justice that so long as appellants were justified in advancing the money to pay for horses on drafts drawn in the name of the partnership, appellees would be liable for the payment of the drafts until they had given notice to the contrary or appellants had received notice of the dissolution of the firm. It was certainly their duty, when they received knowledge of the dissolution of the firm of Grindell & Dainty, to have protected themselves as well as appellants by notifying appellants of the fact and that they withdrew their agreement to honor further drafts if any such were drawn. Appellees' failure to so notify appellants was inexcusable negligence under the facts in this case. The quiet withdrawal of Dainty from the firm without notice to appellants would, we think, no more relieve appellees from liability than it would have relieved Dainty if the action had been brought against the partnership, and as we have before stated, under the facts proven a recovery might have been had against the firm of Grindell & Dainty.

The acceptor of a bill of exchange becomes primarily liable for its payment, and is to be considered the principal debtor; and this is true even of the acceptance was for the accommodation of the drawer, the acceptor having no funds of the drawer in his hands to pay it. Cronise v. Kellogg, 20 Ill. 11; Diversy v. Moor, 22 Ill. 331, 74 Am. Dec. 157. In Hall v. First Nat. Bank of Emporia, 133 Ill. 234, 24 N. E. 546, Hall Bros. were commission men in the Union Stock Yards. In response to a request from Greer & Way they telegraphed the First National Bank of Emporia they would honor Greer & Way's draft for cost of cattle and hogs consigned to them. It was held Hall Bros.' agreement to accept the draft before it was drawn made their liability the same that it would have been had they accepted it upon presentation, and that they took the risk of the stock being diverted, either by accident or design, while in transit.

It is insisted that in any event appellees were justified in refusing to honor the draft because it was drawn for $1,000 more than was required to pay for the horses shipped, and on that account there can be no recovery. The suit is brought to recover only the $2,300, and one of the counts of the declaration contains averments of the credit of $1,000 upon the draft as originally drawn. It does not appear from the evidence that appellees based their refusal to honor the draft on the ground that it was drawn for $3,300 instead of $2,300, nor have they at any time signified a willingness to pay $2,300. On the contrary, they have from the first denied any liability whatever, and have based their denial on the ground that the partnership between Grindell and Dainty had been dissolved before the draft was drawn, and that it was the draft of Grindell, and not of Grindell & Dainty.

We think the propositions of law refused by the trial court stated

Digitized by Google

correct principles of law applicable to the decision of this case and should have been held by the court, and that the Appellate Court erred in affirming the judgment of the trial court. Accordingly, the judgments of the Appellate and Superior Courts are reversed, and the cause remanded to the Superior Court.

Reversed and remanded.

DUNN, J. (dissenting). Since all questions of fact must be regarded as settled against appellants by the Appellate Court's affirmance of the judgment of the Circuit Court, it must be regarded as conclusively determined that the partnership of Dainty & Grindell was dissolved before the draft in question was drawn, and that Grindell had no authority to draw it in the firm name. Therefore it was, in fact, not the draft of Dainty & Grindell. The appellees had a right to stand upon their contract. If its terms bound them, they were bound; otherwise, they were not bound. The only count in the declaration on which a recovery could be claimed was the first, which alleged that Dainty & Grindell drew a draft on appellees for $3,300, which appellants cashed and which appellees refused to pay. The contract which is claimed to make appellees liable for the payment of the draft is set out in the count, and is a letter addressed to appellants, signed by appellees, and consisting of a single sentence: "We will honor drafts drawn by Dainty & Grindell, drawn on us for horses until further notice." By the terms of the letter appellees were bound to pay only drafts drawn by Dainty & Grindell, and only such drafts drawn by them as were drawn for horses. Appellants, in discounting the drafts, were bound to ascertain, at their peril, that such drafts were within the terms of the letter. They were bound to know, not only that the drafts were drawn for horses, but that they were drawn by Dainty & Grindell. In fact, the draft in controversy was not drawn by Dainty & Grindell. The fact that the appellants were deceived into thinking it was so drawn, and that both Dainty & Grindell may be liable to them for the dishonor of the draft, does not authorize holding appellees to a contract into which they have not entered.

Many authorities are cited by appellants' counsel to the proposition that upon the dissolution of a partnership the power of each partner to bind the others continues as to persons who have had dealings with the partnership until they have received actual notice of the dissolution. This is undoubtedly true, but is not applicable here because the question is not whether the signature, "Dainty & Grindell," made by Grindell without authority, binds Dainty, but whether it binds appellees. The latter agreed to pay drafts actually drawn by Dainty & Grindell — not drafts which appellants might have good reason to believe were drawn by Dainty & Grindell. Even if appellees had notice of the dissolution of the firm they were under no obligation to notify appellants. Byers & Co. v. Hickman & Co., 112 Iowa, 451, 84 N. W. 500; Burch v. De Rivera, 53 Hun (N. Y.) 367, 6 N. Y. Supp. 206. They had stated the terms upon which they would honor drafts, and unless those precise terms were complied with by the production of a draft drawn by the designated parties, they could not be held liable upon their specific agreement. First Nat. Bank of Lacon v. Bensley, (C. C.) 2 Fed. 609.

Digitized by Google

Moreover, this action is brought upon a draft for $3,300, which it is alleged appellees agreed to accept. There is no basis for a recovery upon a quantum meruit or quantum valebat. The appellees either agreed to accept this particular draft or they did not. There is evidence tending to prove, and it must be presumed that the court found, that Grindell bought the horses for $2,300 but that the draft was drawn for $3,300. This was probably a mistake; but can it be said that appellees' agreement to honor drafts drawn for horses required them to honor this draft for $3,300 not drawn for horses? They stated in their letter the precise terms on which they would honor drafts. A compliance with those terms was essential, and appellants, in discounting the draft, took upon themselves the risk of being within those terms. Burke v. Utah Nat. Bank, 47 Neb. 247, 66 N. W. 295. Appellees' agreement was to honor drafts. If appellants recover, it must be upon a draft. They have declared upon a draft for $3,300. There is no evidence tending to prove authority to draw such a draft or obligation on the part of appellees to honor it. In my opinion, the judgment should be affirmed.

Decision No. 1085.

FRED RUEPING LEATHER CO. v. WATKE.

(Supreme Court of Wisconsin. May 8, 1908.)

116 N. W. 174.

BILLS AND NOTES — EXECUTION — DURESS — WORDS AND PHRASES — "DURESS" — CONSIDERATION — IMMUNITY FROM PROSECUTION.

1. Where defendant, after knowledge that his business partner had purchased certain hides belonging to plaintiff from a thief, voluntarily executed certain notes sued on, to plaintiff, for the value of the hides, after considering the matter and consulting with his attorney, the notes were not executed under duress.

2. Duress exists where one, by the unlawful act of another, is induced to make a contract, or perform some act under circumstances which deprive him of the exercise of free will.

3. Notes executed in settlement of a claim for hides belonging to the payee, which the maker's business partner had purchased from a thief, were based on a sufficient consideration.

4. It was no defense to certain notes that they were executed to save the maker from prosecution for receiving stolen goods, where there was neither allegation nor proof that, at the time the notes were given, any criminal prosecution was pending against him, or that he was, in fact, guilty of any criminal offense.

Appeal from Circuit Court, Fond du Lac County; Chester A. Fowler, Judge.

Action by the Fred Rueping Leather Company against Albert F. Watke. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was commenced by the plaintiff against the defendant, to recover upon nine promissory notes of $100 each, executed by

Digitized by Google

the defendant, ten notes having been originally executed, and one paid, before the commencement of this action. Te answer sets up as defensive matter want of consideration, and further alleges that the notes were void, because defendant was threatened with criminal prosecution for having received stolen property unless he would pay a large amount of money, and that he, through fear of said threats, and in consideration of not being prosecuted, executed said notes. The answer also contains a counterclaim, asking for cancellation of the notes and recovery of the amount paid on one of the notes before action brought. The plaintiff replied, denying the allegations of the counterclaim. On the trial the court directed a verdict for the plaintiff, and defendant appealed from the judgment entered upon the verdict.

Morse & Williams, for appellant. Maurice McKenna (Doyle & Hardgrove, of counsel), for respondent.

KERWIN, J. (after stating the facts as above). The contention on the part of the appellant is that there was sufficient evidence to go to the jury on the issues raised, therefore the court erred in directing a verdict for plaintiff. It appears from the established facts that, several months before the execution of the notes, certain hides were stolen from plaintiff, and that some were sold by the thieves to the business partner of defendant, and paid for by defendant; that thereafter the thief was prosecuted and convicted of the offense, and plaintiff demanded payment of defendant for the property received by his firm; that negotiations were had with reference to a settlement, covering a long period of time, and it finally resulted in the execution by defendant and delivery to plaintiff of the ten notes in question of $100 each, and that some time after the first note became due, and before the commencement of this action, it was paid by defendant. The principal contention of defendant is that the notes were executed under duress. After a careful examination of the testimony, we find nothing in it sufficient to support a verdict in favor of defendant upon that proposition. On the controry, the evidence establishes beyond question that the defendant executed the notes freely and voluntarily, after he had taken ample time to consider the matter and advise with his counsel, and concluded to give the notes in settlement of the amount which was finally agreed upon as the consideration for the hides which came into the possession of his business partner. It appears that the amount of the stolen property, which came into the possession of defendant's firm, could not be definitely ascertained, plaintiff claiming $2,500 as its value, and finally agreeing to accept $1,000, in payment of which sum the ten notes were given. At the time the notes were executed and delivered no restraint whatever was exercised over the defendant; but, on the contrary, after consulting with his counsel, and being advised to make the notes, he went to the office of plaintiff's counsel, and freely and voluntarily executed the notes in suit. The doctrine as to what constitutes duress has been so often considered and discussed by this court that we deem it necessary only to refer to a few of the authorities on the subject. Bank v. Kusworm, 91 Wis. 166, 64 N. W. 843; Bank v. North, 114 Wis. 637, 90 N. W. 1016; Rochester M. T. Works v. Weiss, 108 Wis. 545, 84 N. W. 866; Wolff v. Bluhm, 95 Wis. 257,

Digitized by Google

70 N. W. 73, 60 Am. St. Rep. 115; Mack v. Prang, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. Rep. 848; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. This court said, in Bank v. Kusworm, supra: "Duress exists where one, by the unlawful act of another, is induced to make a contract, or perform some act under circumstances which deprive him of the exercise of free will." We think the undisputed evidence not only fails to show duress, but establishes that there was no duress.

On the question of want of consideration we think it equally clear that this defense was not established; but, on the contrary, that it was established without substantial dispute that the notes were given in payment of the stolen hides received by the defendant's firm. In fact it was not disputed but what the settlement was made and the notes given to pay for such property.

Respecting the claim in appellant's brief that the notes were given to avoid prosecution, hence illegal and void, we think it sufficient to say that neither the allegations of the answer nor the proof support such defense. There is, in fact, no testimony rising to the dignity of proof of an agreement not to prosecute defendant for any offense. There is neither allegation nor proof that, at the time the notes were given, any criminal prosecution was pending against the defendant, or that he was in fact guilty of any criminal offense. Such allegation and proof would be necessary in order to support this defense. Catlin v. Henton et al., 9 Wis. 477; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Bank v. Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; Johnston H. Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; section 4501, St. 1898. The court below found that there was not sufficient evidence to go to the jury upon any of the issues raised by the defendant's answer, and we are inclined to the opinion that the court was right, therefore, cannot disturb the ruling. It follows that the judgment below must be affirmed.

The judgment of the court below is affirmed.

Decision No. 1086.

BANK OF MOREHEAD v. HERNIG et al.

(Supreme Court of Pennsylvania. March 2, 1908.)

69 Atl. 679.

BILLS AND NOTES — ACTION ON NOTE — AFFIDAVIT OF DEFENSE.

Where an indorsee of a note brought action thereon against the maker on a statement of claim which did not aver that plaintiff was a bona fide holder, an affidavit of defense averring that the note was taken after notice of the payee's defective title, and that no consideration passed, was sufficient, and put plaintiff on proof of the bona fides of the transaction.

Appeal from Court of Common Pleas, Philadelphia County.

Digitized by Google

Action by the Bank of Morehead against Peter Hernig and Ely K. Richard. From an order making absolute rule for judgment for want of a sufficient affidavit of defense, defendants appeal. Reversed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

J. S. Freeman, for appellants. W. H. G. Gould, for appellee.

MESTREZAT, J. This is an appeal from a judgment entered by the court below for want of a sufficient affidavit of defense. The criticism of the affidavit by the learned counsel for the appellee has at least some ground to support it, but it may be suggested that a like criticism might have been made by the appellants' counsel against the statement. We must, however, dispose of the case as we find it, and, if either party suffers by disregarding the well-settled rules of pleading, he has no just ground to complain. This action was brought by the plaintiff against the defendants to recover on a promissory note for $2,500, dated May 16, 1906, and payable four months after date to the order of E. V. Carr, who indorsed and delivered it to the plaintiff. The statement avers that the defendants executed the note and delivered it to Carr, who "prior to the maturity of the said note indorsed and delivered the said note to the said Bank of Morehead, aforesaid plaintiff." The affidavit of defense avers that the defendants executed and delivered two notes, one dated May 11th and the other May 16th, to Carr for his accommodation; that Carr agreed that, if he succeeded in having one discounted, the other would be returned to the makers; that the two notes were given to take up a note previously given by the makers for the the same amount which represented an indebtedness due by Carr to a third party; that Carr had one of the notes discounted at the National Deposit Bank of Philadelphia, and received the proceeds and that note has since been paid by the defendant, Hernig; that, when Carr was requested by the defendants to return the note in suit, he advised them that he had left it in Kentucky, but would get it and return it; and that shortly thereafter Hernig "received an inquiry as to this note from the plaintiff bank, whereupon this deponent notified the bank that they should not advance any money to Carr upon this note, that the deponents were not indebted to said Carr." The affidavit further avers that no money, or, if any, then but a very small amount, had been advanced by the plaintiff bank prior to the receipt of the notice given by Hernig, notifying the bank not to advance any money on the note to Carr. The affidavit then directs attention to the fact that there is no averment as to when or how the plaintiff advanced any part of the money to Carr, and that the statement does not set forth that the plaintiff was a holder for value of the note without notice prior to its maturity.

We think the affidavit is sufficient to send the case to a jury. The defendants are not seeking to prevent a recovery on the note because of their being accommodation makers. They claim that Carr made a fraudulent use of the note, and that the bank had notice that his title was defective before it discounted it. The affidavit clearly shows that the defendants were accommodation makers, and that Carr negotiated the note in violation of his agreement to return

Digitized by Google

it to the makers. The other note had been negotiated, and Carr had received the money. He then had no right to use the other note, and in doing so he was committing a fraud on the accommodation makers. If the plaintiff bank had knowledge of this defect in the title, it is not a bona fide holder for value without notice, and cannot enforce payment from the defendants. The statement does not aver that the plaintiff is a bona fide holder for value, which is the usual form of averment in suits on promissory notes by an indorsee against the maker. It is true that every holder is deemed prima facie to be a holder in due course, but the uniform practice is to aver in the statement that the plaintiff took the note before maturity, and is a bona fide holder without notice. At all events, when, as here, the affidavit of defense avers that the note was taken by the holder after notice of its defect and that no consideration passed, or, if any consideration did pass it was very small, the plaintiff is put to the proof of the bona fides of the transaction and to show his title.

In Hoffman v. Foster & Co., 43 Pa. 137, the affidavit of defense averred that the note was for the accommodation of the payee, and was sent in a letter to him, that he denied receiving it and asked for a duplicate, promising to return the original, if found. A second note was given and paid by the defendant, who was then sued upon the original note, which the payee had fraudulently negotiated. It was held that the plaintiff was required to prove that he took the note for a valuable consideration and before maturity. In the opinion it is said (page 138): "As against McGinnis (the payee), he (the defendant) always had an ample defense to both notes, and it is clear that the first note has thrown around it a cloud of suspicion and fraud which calls upon the plaintiff to show that he obtained it upon a valuable consideration in the usual course of business before it was due." In Real Estate Investment Company v. Russel, 148 Pa. 496, 24 Atl. 59, it appeared that the note in suit was put in circulation by fraud. In reversing the court below and holding that there was sufficient in the affidavit to call upon the plaintiff to show that he was a bona fide holder, Chief Justice Paxson said (page 499 of 148 Pa., page 59 of 24 Atl.): "It [the averment of fraud] is sufficient to require the plaintiff to show that he took the note before maturity, and paid value for it. Were this not the rule, it would be impossible for the maker of a note, fraudulently issued, to set up any defense whatever. As a general rule, in such cases the maker has no knowledge as to whether the plaintiff paid value or not, hence he cannot conscientiously swear that he is not a bona fide holder. It is no hardship to the plaintiff to require proof of consideration." The same rule obtains under the Negotiable Instruments Law passed in 1901, which is simply declaratory of the law as it existed at the time of the passage of the act. By its provisions, if the title of the person who negotiated the instrument is defective, the burden is on the holder to prove that he or some person under whom he claims acquired a title in due course. The title of a person who negotiates an instrument is defective within the meaning of the act if he obtains the note or any signature by fraud, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. If the transferee receives notice of any defect in the

Digitized by Google

title of the person negotiating it before he has paid the full amount, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Under the circumstances set forth in the affidavit of defense, we think the defendants have disclosed as much knowledge of the consideration paid by the holder for the note in suit as could be expected. They aver that they expect to be able to prove that a very small amount of money, if any, was paid prior to the receipt of the notice given to the plaintiff. In the absence of any averment in the statement that the transfer was made for value and without notice, we do not think the defendants are required, or can be expected, to make a more definite averment in regard to the consideration paid by the plaintiff to the payee for the transfer of the note. The plaintiff has knowledge of what was paid as a consideration, while the defendants do not have such knowledge, and have no means of knowing whether anything was paid or not, and hence they cannot conscientiously aver in their affidavit what consideration, if any, the payee received for the transfer of the note.

The judgment is reversed, with a procedendo.

Decision No. 1087.

ROBINSON v. MUTUAL SAVINGS BANK OF SAN FRANCISCO et al.

(Court of Appeals, First District, California. March 5, 1908. Rehearing Denied April 2, 1908.)

95 Pac. 533.

BANKS AND BANKING — DEPOSITS — OWNERSHIP — EVIDENCE — GIFTS — GIFTS INTER VIRES — TIME OF TAKING EFFECT — JOINT TENANCY — JOINT ACCOUNT IN BANK — ASSERTION AFTER DEATH OF DONOR.

1. Evidence held to show that plaintiff who deposited money in a bank to the joint account of herself and decedent deposited it as the agent of decedent for decedent's use.

2. A valid gift goes into immediate effect and has no reference to the future; it divests the donor of its title, and requires a renunciation on his part of all claim and interest in the subject of the gift, and hence where a woman placed money of her own in a bank to the joint account of herself and another so that either could draw therefrom, and retained the bank book herself, there was no gift of the account to the other person.

3. The deposit of money to the joint account of depositor and his agent did not constitute a joint tenancy or ownership with right of survivorship.

4. Where the claim of a gift is not asserted until after the death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift.

Appeal from Superior Court, City and County of San Francisco; C. B. Hebbard, Judge.

Digitized by Google

Action by Lizzie C. Robinson against the Mutual Savings Bank of San Francisco to recover a deposit in which Joseph Leggett and Charles H. Robinson, as executors of Amanda M. Scales, interpleaded, claiming the money, and upon the deposit of the amount in court by the bank the interpleaders were substituted as defendants. From a judgment for plaintiff and an order denying a new trial, the substituted defendants appeal. Reversed.

Jas. G. Maguire and Devoto & Richardson, for appellants. A. Ruef and F. T. Finch, for respondents.

HALL, J. Plaintiff brought suit against the Mutual Savings Bank of San Francisco to recover the sum of $4,370.49 as the balance of money alleged to have been deposited by plaintiff with said bank. Upon a showing by the defendant bank that Joseph Leggett and Charles H. Robinson, as executors of the last will of Amanda M. Scales, deceased, made claim to the same money, said defendant bank was allowed to deposit with the court said sum of $4,370, and was thereupon dismissed from the action, and said Leggett and Robinson, as such executors, were substituted as defendants. Leggett and Robinson, as such executors, answered plaintiff's complaint, and set up a claim to said money as part of the estate of Amanda M. Scales, deceased. The findings and judgment were in favor of plaintiff and against the substituted defendants, who have appealed from the judgment and the order denying their motion for a new trial. Appellants attack the findings as not being supported by the evidence.

It is alleged in the complaint that prior to the commencement of the action plaintiff deposited with defendant the Mutual Savings Bank of San Francisco, and the said defendant received of and from plaintiff, for the use and benefit of plaintiff, the sum of $5,729.69, which said amount said defendant promised to repay to plaintiff, and that said defendant has repaid to plaintiff the sum of $1,359.20 and no more, thus leaving a balance of $4,370.49.

The substituted defendants, in their answer, deny the allegations of the complaint above set forth, and further allege that prior to the 7th day of July, 1904, Amanda M. Scales deposited said sum of $5,729.69 with said defendant, the Mutual Savings Bank of San Francisco, and caused said deposit to be made payable by said defendant to "Amanda M. Scales or Lizzie C. Robinson." "That said Amanda M. Scales so directed and made said deposit payable to 'Amanda M. Scales or Lizzie C. Robinson' for the sole purpose of enabling said Lizzie C. Robinson, as the agent of the said Amanda M. Scales, to withdraw moneys from said deposit for the use and benefit of said 'Amanda M. Scales' and as the same might be required by said Amanda M. Scales, or to be paid out by her through said Lizzie C. Robinson (the plaintiff herein) as the agent of said Amanda M. Scales." That prior to the 7th day of July, 1904, said Amanda M. Scales withdrew from said deposit the sum of $1,359.20, and no more, leaving a balance on deposit with said defendant bank of $4,370.49. Amanda M. Scales died on the 7th day of July, 1904.

The court found all the allegations of the complaint to be true, and also found "That it is not true that prior to the commencement of this action, and prior to the 7th day of July, 1904, or at any other time, Amanda M. Scales deposited with said defendant Mutual Sav-

Digitized by Google

ings Bank of San Francisco the sum of $5,729.69, or any sum." "That it is not true that prior to the 7th day of July, 1904, or at any other time, said Amanda M. Scales withdrew from said deposit the sum of $1,359.20, or any sum whatever." From the foregoing statement of the contents of the pleadings and of the findings, it is apparent that the plaintiff's complaint was framed upon the theory that all the money deposited was deposited by plaintiff for her own use and from her own money, and that Mrs. Scales deposited none of it, and had no interest therein, and that the court in its findings fully adopted such theory of the facts. No such theory can be sustained upon the facts disclosed by the record before us.

Mrs. Scales, at the opening of the account in question, was upwards of eighty years of age and totally blind. The plaintiff had been in the habit of attending to business for her for several years before the opening of this account. The account was opened on March 10, 1902, by the deposit of a check for $1,149.05 belonging to Mrs. Scales, and was opened in the name of "Amanda M. Scales or Lizzie C. Robinson." Every item of deposit belonged to Mrs. Scales at the time of its deposit, as is admitted by plaintiff on the witness stand, save, possibly one, which confessedly also did originally belong to Mrs. Scales. This item will be referred to later. Concerning the opening of the account the plaintiff testified in substance that she obtained a check for Mrs. Scales, payable to her, from Bovee, Toy & Sontagg for $1,149.05; that Mrs. Scales indorsed the check and plaintiff deposited it in the bank. In answer to the question, "For what purpose did Mrs. Scales tell you at that time that she gave you that check?" the plaintiff said, "She wanted to establish a claim there that I could draw against — an account there that I could draw against, and pay bills for her, because she was constantly demanding such services of me, and she said, at the time, she said, 'I want to open this little account, it will be a joint account; whatever is left after I am gone shall be yours.'" She further said that all the other deposits in the account were from Mrs. Scales, and came from rentals of her property and different sources. Upon cross-examination she testified: "When this first deposit was made on the 10th day of March, 1902, Mrs. Scales told me that she wanted me to pay her bills out of the account, and to open that account for the purpose of enabling me conveniently to do that, and whatever remained after she died was to be mine; or that I could draw against it while she lived if I chose to. I never drew against it for any account, except her own, while she lived."

The evidence shows without conflict that plaintiff, acting for Mrs. Scales, for her use and to pay her bills, drew from the account the sum of $1,359.20. Plaintiff also testified that Mrs. Scales also told her that she might draw from the account for her personal use, but she never did so. The evidence above set forth does not support the finding that the sum of $5,729.69 was deposited with the bank by plaintiff for her use and benefit in the sense and meaning of the finding. In a legal sense the deposits were made by Mrs. Scales for her use and benefit. The plaintiff was acting simply as the agent of Mrs. Scales, and was depositing the money of Mrs. Scales for her use. For the same reason the evidence does not support the finding of the court: "That it is not true that prior to

Digitized by Google

the commencement of this action, and prior to the 7th day of July, 1904, or at any other time, Amanda M. Scales deposited with said defendant, Mutual Savings Bank of San Francisco, the sum of $5,729.69, or any other sum." The money was deposited by Mrs. Scales through her agent, the plaintiff, and likewise, in legal effect, whatever was withdrawn was withdrawn by her through her agent the plaintiff.

The evidence does not show a gift by Mrs. Scales to plaintiff of all the moneys deposited in the account or of the account itself. Although the deposit was in the names of either, and either could draw therefrom as between themselves and the bank, this does not show a gift to plaintiff, nor constitute a joint tenancy or ownership with a right of survivorship. Mrs. Scales at all times retained the right herself to draw the money. She retained dominion over it. She never delivered the bank book to plaintiff. It at all times remained in the possession of the bank at the convenience of both Mrs. Scales and plaintiff. "A valid gift goes into immediate effect, and has no reference to the future. It divests the donor of his title, and requires a renunciation on his part of all claim and interest in the subject of the gift." Denigan v. Hibernia, etc., Soc., 127 Cal. 137, 59 Pac. 389; Denigan v. San Francisco Sav. Union, 127 Cal. 142, 29 Pac. 390, 78 Am. St. Rep. 35. In both of the above-cited cases money, the separate property of a wife, was deposited in the names of the husband and wife, "and payable to the order of either of them." It was held that the form of the deposit did not indicate any gift to the husband or any joint interest of both parties with a right of survivorship. In the latter case it was held that the rule that joint interests or estates are such as are created by a single will or transfer in equal shares, when expressly declared in the will or transfer to be a joint tenancy, applies to personalty as well as to realty. The doctrine of the Denigan cases is supported by the following cases, all which are reviewed in the second Denigan case: Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 486; Gorman v. Gorman, 87 Md. 338, 39 Atl. 1038; Schick v. Grote, 42 N. J. Eq. 352, 7 Atl. 852; Noyes v. Newburyport Sav. Inst., 164 Mass. 583, 42 N. E. 103, 49 Ann. St. Rep. 484.

The evidence does not bring this case within the doctrine of Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370, where money was deposited in such a way as to constitute the bank a trustee for plaintiffs, nor within Sprague v. Walton, 145 Cal. 228, 78 Pac. 645, where the wife, on the order of her husband, actually drew certain money and deposited it in her own name. In no aspect of the case can it be said that the findings attacked are sustained by the evidence, and for this reason the judgment and order must be reversed.

We have not overlooked the testimony given by plaintiff that one item of the deposit was given to her outright by Mrs. Scales for her own use, before the same was deposited. There was a sharp conflict in the evidence on this point, Mr. Leggett testifying to a statement made to him quite inconsistent with the claim that the item in question had been given to plaintiff. In this connection it is well to revert to what was said in Denigan v. Hibernia, etc., Soc., supra: "When the claim of a gift is not asserted until after the

Digitized by Google

death of the alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute a gift."

But whatever the fact may be concerning the claim that this particular item was given to plaintiff, and by her afterwards deposited in the account sued on, the amount of the same is less than the balance sued for and for which judgment was given. If this particular sum of money was therefore the money of plaintiff, and deposited by her for her use in the account, this fact does not sustain the findings as made, nor the judgment rendered.

The judgment and order are reversed.

We concur: COOPER, P. J.; KERRIGAN, J.

Decision No. 1088.

HOROWITZ v. WOLLOWITZ et al.

(Supreme Court, Appellate Term. June 3, 1908.)

110 N. Y. Supp. 972.

BILLS AND NOTES — LIABILITY OF INDORSER — NATURE OF CONTRACT OF INDORSER.

1. Under Negotiable Instruments Law, Laws 1897, p. 734, c. 612, § 116, providing that an indorser without qualification warrants to all subsequent holders that the instrument is valid and subsisting, an indorser of a note cannot defend on the ground that the same was void because of usury in its inception.

2. The obligation of an indorser is a new and independent contract separate and distinct from the contract evidenced by the note.

Appeal from Municipal Court, Borough of Manhattan, Seventh District.

Action by Harry Horowitz against Louis Wollowitz and others. Judgment for defendants, and plaintiff appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and GIEGERICH and GREENBAUM, JJ.

Sternberg & Jacobson, for appellant. Abr. A. Silberberg, for respondents.

GIEGERICH, J. The complaint alleges that on the 28th day of December, 1906, the defendant Barnet Cohen made and delivered to the defendant Jacob Jormack his promissory note, in form as follows:

"$500.00 Dec. 28, 1906.

"Six months and five days after date I promise to pay to the order of myself five hundred dollars at 16½ Carmine St.

"Value received. B. Cohen."

— and that at the time of making said note, and prior to its delivery to the plaintiff, the defendant Louis Wollowitz indorsed it, for the

Digitized by Google

purpose of giving credit thereto with the defendant Jormack, and with the intent to charge himself as first indorser. It is further alleged that thereafter and before maturity the defendant Jormack indorsed the note to the plaintiff, who on the credit of the prior indorsements, gave value therefor. Then follow appropriate allegations of presentment, non-payment, protest, and notice. The answer, among other things, sets up that Jormack exacted and received usury from Cohen, the maker of the note, and that the defendant signed his name to said note after such usurious agreement had been consummated and executed between Jormack and Cohen, and that the note was tainted with usury in its inception, and never had any legal and valid inception, and was void for usury.

Upon the trial the plaintiff testified that in June, 1907, the defendant Jormack owed him a balance of $650 on account of moneys loaned by him, and that in the early part of July in that year he accepted the note in question in payment of $500 of such indebtedness. At the close of the plaintiff's case a concession was made that there was usury in the inception of the note between Cohen and Jormack. The defendant put in no evidence, but moved to dismiss the complaint on the ground that it affirmatively appeared that the note was void in its inception. The court reserved decision, and subsequently rendered judgment in favor of the defendant.

The answer, in addition to the averments above referred to, also alleges that the plaintiff paid no consideration for the note, and held the same for the benefit and interest of Jormack, who continued to be the real party in interest; and certain facts were elicited on the cross-examination of the plaintiff which might be deemed as having a bearing on such issue, but the briefs argue the case as though it hinged on the sole question presented by the defendant's motion to dismiss, and it will be so considered and decided. On behalf of the appellant it is claimed that section 96 of the Negotiable Instruments Law (Laws 1897, c. 612, p. 732) has entirely swept away the defense of usury as against holders in due course, citing Schlesinger v. Kelly, 114 App. Div. 546, 99 N. Y. Supp. 1083; Wirt v. Stubblefeld, 17 App. Cas. D. C. 284; Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. Supp. 93, and the concurring memorandum of Mr. Justice Willard Bartlett in Schlesinger v. Gilhooly, 189 N. Y. 1, at page 34, 81 N. E. 619, at page 631.

It is not necessary in the present case, however, to pass upon the question of the availability to the maker of a note of the defense of usury as against holders in due course, because the liability involved in this appeal is that of an indorser, not of the maker, and the liability of an indorser is dealt with in other portions of the act; section 116 providing:

"That every indorser who indorses without qualification warrants to all subsequent holders in due course: . . . (2) That the instrument is at the time of his indorsement valid and subsisting."

In Packard v. Windholz, 88 App. Div. 365, 84 N. Y. Supp. 666, one Truman made his promissory note to one Eaton, and then forged Eaton's indorsement, and next procured the defendant Windholz to indorse it. The note with these two indorsements upon it, was presented to the plaintiffs, who were note brokers, and by them was negotiated for the benefit of Truman. The defendant and those

Digitized by Google

subsequent to him believed the indorsement of Eaton was genuine, and the plaintiffs learned he was responsible. The Appellate Division sustained the judgment in favor of the plaintiffs, holding that the defendant by his contract of indorsement guaranteed the genuineness of the signature of Eaton, the prior indorser on the note, and that the note was a valid and subsisting obligation, citing section 116 of the Negotiable Instruments La. This ruling was upheld by the Court of Appeals without opinion. 180 N. Y. 549, 73 N. E. 1121.

In Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11, it was held that the fact that the name of the maker of a note was forged did not discharge the indorser; the ground of the decision being that the indorsement of a promissory note implies a contract by the indorser with a subsequent bona fide holder that the instrument itself and all the signatures prior to the particular indorsement are genuine.

Under the language of the statute, as applied by the above decisions, it must be held that in indorsing the note the defendant warranted its validity, and that he cannot be heard now to assert that it is void for usury, any more than for forgery or any other cause. Furthermore, apart from the provisions of section 116, it is an established rule that the obligation of an indorser is a new and independent contract, separate and distinct from the contract evidenced by the note. 4 Am. and Eng. Encyc. of Law (2d ed.) 477, and cases cited; Morford v. Davis, 28 N. Y. 481; Donohoe v. Meeker, 35 App. Div. 43, 54 N. Y. Supp. 286.

The judgment should be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

Decision No. 1089.

FORBES v. FIRST NAT. BANK OF ENID.

(Supreme Court of Oklahoma. May 15, 1908.)

95 Pac. 785.

BILLS AND NOTES — BONA FIDE HOLDER — ACTION — DEFENSE OF FRAUD.

1. In an action on a negotiable draft by the holder thereof who acquired it for value before maturity without notice against an indorser from whom the draft was obtained by fraud, knowledge of such facts as would put a prudent man upon inquiry in reference to the draft is not sufficient to defeat the right of the holder to recover, and the court may direct a verdict in favor of the holder, when the circumstances surrounding the transaction are not sufficiently strong for it to be said as a matter of law that bad faith may be reasonably inferred therefrom.

2. A person who was held out by a bank as assistant cashier while in the control and management of the bank, in the absence of the cashier from the State, transferred to a second bank a negotiable draft in part payment of the balance due the second bank by his bank on the day's clearing. Held, that the second bank thereby obtained sufficient title to the draft to maintain an action thereon against an indorser who transferred the draft to the first bank.

(Syllabus by the Court.)

Digitized by Google

Error from District Court, Garfield County; B. F. Burwell, Judge.

Action by the First National Bank of Enid against J. E. Forbes. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action brought by the First National Bank of Enid, Okla., against the Fourth National Bank of Dayton, Ohio, Citizens' Bank of Enid, Emily Smith, J. E. Forbes, and R. L. Denton, receiver of the Citizens' Bank, upon a draft drawn by the Fourth National Bank of Dayton on the Hanover National Bank of New York for the sum of $700 and indorsed by Emily Smith, Citizens' Bank of Enid, and J. E. Forbes. It does not appear that any service was had upon the Citizens' Bank of Enid, or upon Emily Smith, and no appearance is made for them so far as the record discloses. The case was tried before a jury, and, after evidence was introduced by both parties, the court sustained a motion of plaintiff to direct the jury to return a verdict for it. For convenience the First National Bank of Enid will hereafter be referred to as the plaintiff, or as the First National Bank, and the Citizens' Bank of Enid as the Citizens' Bank. On the 4th day of April, 1904, the Fourth National Bank of Dayton, Ohio, made a draft for $700 on the Hanover National Bank of New York, payable to the order of Emily Smith. This draft was brought to Enid, Okla., and on the 19th day of April, 1904, Emily Smith indorsed it in blank, and delivered it to J. E. Forbes in payment for certain real estate purchased from him on that day. About 4.15 o'clock P. M. of that day Forbes deposited the draft in the Citizens' Bank and received credit on his pass book for the amount thereof. The Citizens' Bank was at that time a banking corporation organized under the laws of the Territory of Oklahoma, doing business at the city of Enid, Okla. H. H. Watkins was its cashier, Wm. Kennedy, its president, and W. T. Dugan, its assistant cashier, but the evidence does not disclose that Dugan was a stockholder in the bank. On the 19th day of April, 1904, as agreed by the parties to this action, the Citizens' Bank was insolvent. Watkins, the cashier of the bank, on that day had gone to Kansas City for the purpose of securing financial aid to tide him over the difficulties then surrounding the institution. In his absence, the affairs of the bank were carried on by Dugan, an assistant cashier. At that time the First National Bank was engaged in the banking business, with S. T. Goltry as its president. On the 19th day of April, 1904, at about the hour of 1.30 P. M., there was a clearance had between the Citizens' Bank and the First National Bank, which showed a balance in favor of the latter in the sum of $4,400. For the purpose of paying this balance, the Citizens' Bank issued to the First National Bank its draft on the City National Bank of Kansas City for that sum, and the draft was delivered to the First National Bank at the time of the clearance. Dugan, the assistant cashier of the Citizens' Bank, requested that the draft should not be forwarded for collection until he should see the First National Bank again, stating that he was expecting a telegram from Kansas City which might inform him that the account of the Citizens' Bank had been changed from the City National Bank of Kansas City. About 4.45 P. M. of that day, Dugan not having given the First National Bank any further information relative to the draft for $4.400, Goltry,

Digitized by Google

president of the First National Bank, took the draft to the Citizens' Bank and inquired of him whether he had heard from Kansas City, and whether the First National Bank should remit the draft, and, on being informed that he had not heard from Kansas City, Goltry asked that the Citizens' Bank make some other arrangement for settlement of the balance due the First National Bank on the day's clearing. Dugan delivered to Goltry in payment of said balance all the checks and drafts the Citizens' Bank had received that day, amounting to the sum of $3,200. The items delivered by him to Goltry included the draft involved in this action. To secure the remainder of the $4,400 Goltry took some form of duebill or cashier's check, signed by Dugan, as assistant cashier, and took as collateral a United States bond for the sum of $500, and a note for $1,000 executed by the Enid Wholesale Grocery Company in favor of the Citizens' Bank. Goltry then returned the draft on the bank in Kansas City. This transaction occurred on Tuesday. On Saturday prior thereto a draft was issued by the Citizens' Bank for the sum of $1,800 in favor of the First National Bank, which was forwarded by the First National Bank to its correspondent in Kansas City. On the Monday following, being the 18th day of April, 1904, this draft was presented for payment, which was refused, and the draft went into the hands of a notary public for the purpose of being protested. Of this fact Goltry, the president of the First National Bank, was notified by wire, but later on the same day the draft was taken from the hands of the notary public and was paid. After receiving the telegram on Monday to the effect that his draft had been placed in the hands of a notary public for protest, Goltry called upon Watkins, cashier of the Citizens' Bank, and offered his assistance to tide the Citizens' Bank over its financial embarrassment, but was assured by Watkins that the assistance was not needed. Some time during the night of April 19th, or on the morning of the 20th, the assistant cashier of the Citizens' Bank notified the bank commissioner of the condition of the bank, and on the morning of the 20th the bank went into the hands of the bank commissioner. Early on the morning of the 20th day of April Forbes learned of the failure of the Citizens' Bank, and stopped payment of the $700 draft sued on in this action. Upon the verdict of the jury directed by the court, judgment was rendered in favor of plaintiff against the Citizens' Bank, its receiver, and J. E. Forbes. The case is brought to this court on appeal by J. E. Forbes.

Manatt & Sturgis, for plaintiff in error. Charles West and Winfield Scott, for defendant in error.

HAYES, J. (after stating the facts as above). It is admitted that the Citizens' Bank was insolvent at the time it obtained the draft from Forbes. There is evidence sufficient to go to the jury to the effect that the officers of the bank knew it was insolvent at that time, and that the president of the First National Bank had knowledge at the time it obtained the draft from the Citizens' Bank that the Citizens' Bank was in a failing condition, and that it had knowledge that the Citizens' Bank had acquired the draft on the same day the draft was transferred to it by Dugan, but there is no evidence that the president of the First National Bank or any other officer of the bank had any knowledge of how the Citizens' Bank had acquired the draft from

Digitized by Google

Forbes, or that it had acquired it from Forbes. The draft in question is a negotiable instrument in the strictest sense. It was acquired by the First National Bank for value before maturity. It was accepted by the First National Bank in part payment of the balance due it by the Citizens' Bank on the clearance of that day. The doctrine that the receiving of a negotiable instrument in payment of or as security for a pre-existing debt is receiving it for a valuable consideration is supported by the weight of authorities of both the State and federal courts of the Union. Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Norton on Bills and Notes, 294; 1 Daniel on Negotiable Instruments, par. 184; Winfield National Bank v. McWilliams, 9 Okla. 493, 60 Pac. 229. Plaintiff's possession of the draft, indorsed by the payee in blank, was prima facie evidence that it acquired the same in good faith for value in the usual course of business before maturity, but, when Forbes introduced evidence tending to show that the draft had been obtained from him by the Citizens' Bank at a time when it was insolvent and the officers thereof knew it was insolvent, established such fraud in the Citizens' Bank's obtaining said draft from Forbes that the burden of proof then shifted to the First National Bank to show it had acquired the draft in good faith for value in the usual course of business. However, if plaintiff thereafter established that it received the draft for value in the usual course of business, and under circumstances that did not operate as constructive notice of the fraud by which Forbes had been induced to part with it, then the burden of proof was upon Forbes to prove actual notice of fraud. 1 Daniel on Negotiable Instruments, 812, 815, 819; Winfield National Bank v. McWilliams, supra. There was no proof that plaintiff had actual notice of fraud practiced upon Forbes by the Citizens' Bank in acquiring said draft. The fact that the president of the First National Bank may have had knowledge that the Citizens' Bank was in a failing condition does not prove notice to it of the fraud of the Citizens' Bank in procuring the draft in question from Forbes. Plaintiff, by showing that it was a purchaser for value before maturity of said draft, established its right to recover thereon, unless such right be defeated by proof of notice of the equities of Forbes or of its bad faith. In Atlas National Bank v. Holm et al., 71 Fed. 489, 19 C. C. A. 94, the United States Circuit Court of Appeals of the Seventh Circuit said: "There has been a contrariety of rulings on the subject, but the weight of authority has long been (in the federal courts, certainly since Swift v. Tyson, 16 Pet. [U. S.] 1, 10 L. Ed. 865) that one who takes an assignment of commercial paper before maturity, paying value, without notice of infirmity in the title or consideration, is deemed a good faith purchaser, and that, to deprive him of that character, it is not enough that he neglected to make the inquiry which under the circumstances a prudent man would or ought to have made."

It is contended by plaintiff in error that the conduct of Goltry in going to the Citizens' Bank after banking hours and obtaining the draft in question, and the other items of remittance which had been received by the Citizens' Bank during that day and the government bond and a note in settlement of the balance due by the Citizens' Bank to the First National Bank, when Goltry had knowledge that the Citizens' Bank was in a failing condition, and that it had acquired

Digitized by Google

said draft on that day, establishes the bad faith of the plaintiff in taking the draft. He contends that the circumstances under which the draft was obtained were such as should have created a suspicion in the mind of Goltry, and put him upon inquiry, and that his not having made inquiry of the assistant cashier of the Citizens' Bank as to how he obtained the draft establishes the bad faith of the plaintiff. We think this contention not well founded, for it has become the well-established rule in the federal courts of the Union and in the greater number of State courts that suspicion of defect of title or even gross negligence on the part of a taker of a negotiable instrument will not defeat his title. Atlas National Bank v. Holm et al., supra; Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857; Hotchkiss v. National Banks, 21 Wall. (U. S.) 354, 22 L. Ed. 645; Clark v. Evans et al., 66 Fed. 263, 13 C. C. A. 433; Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. Ed. 934; 1 Daniel on Negotiable Instruments, 766. In Murray v. Lardner, supra, Mr. Justice Swayne, speaking for the court, said: "The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.' The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part. The burden of proof lies on the person who assails the right claimed by the party in possession. Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith." In Goodman v. Harvey, 4 Ad. & El. 870, it was held that gross negligence might be evidence tending to show mala fides and as such admissible, but that it did not in itself amount to proof of mala fides, and was not sufficient to deprive the holder of his right to recover. In Hamilton v. Vought, 34 N. J. Law, 187, it was held that, when mala fides is the point of inquiry, suspicious circumstances must be of substantial character, and, if such circumstances do not appear, the court can arrest the inquiry, and that the circumstances must be strong so that bad faith can be reasonably inferred. The court in that opinion used this language: "To preserve the negotiability of commercial paper and guard the interest of trade, it is absolutely necessary that large power should be placed in the judicial hand when the question arises as to what facts are sufficient to defeat the claim of the holder of a note or bill which has been taken before maturity, and for which value has been paid. It is only in this mode that the requisite stability in transactions of this kind can be retained." The circumstances that surround the transfer of the draft in this suit by the Citizens' Bank to the plaintiff tend to prove that the plaintiff had knowledge of the failing condition of the bank, but these circumstances are not sufficient to fasten upon the plaintiff a strong suspicion that the draft in question had been fraudulently obtained. There are various ways by which this draft could have been acquired by the Citizens' Bank on the day of its failure and been obtained without fraud. It could have been delivered to the

Digitized by Google

bank in payment of an indebtedness. The bank could have paid cash for it. The bank could have given exchange on other banks for it. There was nothing in the face of the draft to indicate that Forbes had any interest therein. He had delivered the same to the bank as a negotiable instrument. It was within his power, if he had so desired, to have indorsed the same for collection and deposited it, and thereby have given notice to all into whose hands the draft should come that he had an interest in the same, but he did not do so. He placed it within the power of the Citizens' Bank to transfer it as a negotiable instrument, and to treat it as its property. If one of two equally innocent persons must suffer from the wrong conduct of a third person, the one who places it within the power of the third person to commit the wrong should suffer. There is not the slightest evidence in the record that Goltry had any knowledge whatever of how the bank had obtained the draft from Forbes, nor was there evidence to impute to him guilty knowledge of such facts or wilful ignorance thereof. The fact that the evidence may show that Goltry had such knowledge as might have made him suspicious that the Citizens' Bank was in a failing condition, and that he acted diligently in an effort to collect the balance due by the Citizens' Bank to plaintiff, does not prove bad faith. This he had a right to do, and the evidence must show, in order to defeat a recovery, that the plaintiff bank knowingly participated in the perpetration of fraud upon Forbes by the Citizens' Bank, or that it did so in wilful ignorance. It was held by the Court of Appeals of New York, in Magee v. Badger and Another, 34 N. Y. 247, 9 Am. Dec. 691, that the duty or act of inquiry does not rest upon the purchaser of commercial paper to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by the issue as to his intelligence or ignorance. Bona fides is defined in Norton on Bills and Notes (page 306) in the following language: "'Bona fides' or 'good faith' is a term used as a mere distinction from 'mala fides,' or 'bad faith.' If paper be purchased without anything which the law can construe into notice, it is spoken of as being purchased in good faith. Where, on the contrary, the purchaser has what the law construes to be notice of defects or equities, then he is a purchaser in bad faith, and can secure to himself none of the advantages given to the bona fide purchaser; but bad faith means nothing more than participation in the fraud, and resolves itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith." Tiedeman on Bills and Notes (page 256), in speaking of the two different rules that have prevailed in the courts upon what constitutes a bona fide holder, uses this language: "But the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the bona fide character of a holder can be destroyed only by proof of participation in or actual knowledge of the fraudulent or illegal character of the instrument."

It is contended by plaintiff in error that by his introducing evidence that the possession of the note by the Citizens' Bank had been obtained from him by fraud, thereby shifting the burden to the plaintiff to show that he was a bona fide holder for value, the court was precluded from instructing the jury to return a verdict in favor of plaintiff. We cannot agree with this contention of plaintiff

Digitized by Google

in error. It is true that, when the maker or indorser of a negotiable instrument establishes that the execution or transfer of the same was procured by fraud, he prima facie establishes a defense until overcome by evidence of the holder of the instrument that he is a purchaser for value before maturity in good faith, and, upon his doing so, the burden of proving notice of the fraud is then shifted to the defendant. There being no testimony in this case that the First National Bank had notice of the fraud practiced by the Citizens' Bank upon the defendant, Forbes, in the procuring of the draft in controversy, and it having been established that the First National Bank paid full value for the draft before maturity, defendant's defense is reduced to one of bad faith, on the part of the First National Bank, and, since the evidence introduced does not establish bad faith, it was within the power of the court to direct a verdict. "The question is one simply of good faith in the purchaser; and, unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict for the holder." Norton on Bills and Notes, 303.

It is further contended by the plaintiff in error that the First National Bank obtained no title in the draft in controversy, for the reason that Dugan, the assistant cashier, by whom it was transferred to the plaintiff, had no authority to transfer the same to it. The evidence is that Dugan was the assistant cashier of the bank; that on the 19th day of April, 1904, when the transaction between the Citizens' Bank and the First National Bank took place, he was in active management and control of the bank as assistant cashier, in the absence of the cashier from the territory. Smith v. Lawson et al., 18 W. Va. 212, 41 Am. Rep. 688, has been cited by plaintiff in error as decisive of the contention he urges. The facts in that case were that in the year 1866 Anthony Lawson drew a note payable to the order of James A. Nighbert, which was indorsed by Nighbert to the Branch-Bank of Virginia at Charleston. The indorsement of the note to the Branch-Bank of Virginia at Charleston was for the accommodation of both the drawer and the indorser, Nighbert. This note was after maturity assigned by James C. McFarland, president of the Branch-Bank of Virginia at Charleston with a number of other notes, to Isaac N. Smith for a valuable consideration, and was delivered to him without any indorsement thereon, except the blank indorsement of the payee, Nighbert. Afterwards money was deposited by Nighbert with the bank of Virginia at Charleston in the sum of $3,100, with which to pay this note. Nighbert, who made the deposit of the money, did not know at the time he made same that the note had been assigned to Smith. Suit was brought by Smith against Lawson and Nighbert for the recovery of the amount of the note, and it was held by the court that McFarland, the president of the Branch-Bank of Virginia at Charleston was without authority to make the assignment, and that Smith obtained no title, and therefore could not recover against defendants. But the facts upon which the court made this finding are quite different from the facts in the case at bar. In that case the consideration for which the president of the bank at Charleston assigned the note to Nighbert, with other notes of the bank, was the payment of the bank notes issued by the Bank of Virginia in the sum of $27,182, payable at Richmond, and at various other branches of

Digitized by Google

said bank, and in payment of the sum of $1,500 on notes payable at the Branch-Bank of Virginia at Charleston. It had not been the custom of the bank at Charleston to take up and pay the notes of the Bank of Virginia payable at its other branches. Of this fact Smith was advised at the time, and in the written assignment made by the president of the bank at Charleston to Smith of the note involved in that action it is stated by the president that he did not admit the right of Smith to present the notes of he Bank of Virginia payable at Richmond and other branches of the bank to the bank at Charleston, and the language of that assignment clearly advised Smith of the lack of authority of the president of the bank to assign the notes, and advised him that it was an unusual transaction of the bank. It further appeared from the evidence that the directors of the bank, up to the time the suit was brought by Smith against Lawson, had never been advised of the action of its president, assigning the note, and had never confirmed such action. That was a transaction by an officer of the bank not authorized by law, and out of the usual course of business of the bank, to wit, paying off notes of the principal bank of Virginia that were made payable at other branches of the bank, by assigning the promisory notes to the Branch-Bank, done upon threatened litigation. Smith, the holder of said note, threatened to attach the assets of the Branch-Bank at Charleston unless the president made some settlement of the notes held by him; but the facts in the case at bar do not present this condition. Dugan, who was held out by the bank as assistant cashier, authorized to do the necessary acts in the management and control of the bank, transferred the draft involved in this suit in a transaction that occurred daily in the business affairs of the bank. The evidence shows that on each day the balances due on clearings by the Citizens' Bank to other banks were settled by that bank. The method of settlement was, as a rule, to give a draft on the correspondent of the Citizens' Bank at Kansas City. The making settlement by the assistant cashier of the balance due by the Citizens' Bank to the First National Bank of the day's clearing was not an unusual transaction of the bank, and not unlike its daily transactions, except for the fact that it was not made until after banking hours, and that the payment was made in bills of exchange owned by the bank, instead of a draft on the correspondent at Kansas City. To say that the assistant cashier, Dugan, had power to issue a draft upon the bank at Kansas City for the balance due the First National Bank on the day's clearing, and yet would not have power to settle such balance by payment of money to the First National Bank or by transferring to the First National Bank negotiable instruments of the character of the one sued upon in this action, is an effort to make a distinction without a difference.

There is this further distinction between the facts of the case at bar and of the facts in the case of Smith v. Lawson et al., supra. In this case the Citizens' Bank received the benefits of the transaction and retained those benefits, and in the answer of the Citizens' Bank and of its receiver, it is admitted that the draft in this action was assigned on the 19th day of April, 1904, by the Citizens' Bank to the plaintiff for value, thereby admitting the authority of Dugan to assign the draft. We recognize that this admission made in the separate answer of the Citizens' Bank and its receiver is not binding upon the

Digitized by Google

defendant, Forbes; but is to be considered in connection with the evidence in the case as an act of the bank and its representatives recognizing the authority of Dugan to act as he did act upon the day the draft was assigned to plaintiff. Our attention has also been called to the case of Potter v. Merchants' Bank of Albany, 28 N. Y. 641, 86 Am. Dec. 273, as supporting the theory of defendant that the First National Bank could obtain no title to the draft by the transfer made by Dugan. That was an action in the nature of trover brought by plaintiff, Potter, as receiver for the Bank of Medina, against the Merchants' Bank of Albany, for the conversion of a promissory note for $3,000. The facts in that case which distinguish it from the case at bar are well stated in that part of the opinion which we quote: "It appeared on the trial that for ten years prior to the 1st of June, 1861, the defendant had been the collecting agent of the Medina Bank; that the notes of the latter bank were sent to the former for collection, and when collected were credited on its books to the Bank of Medina, the latter drawing on it from time to time, and the drafts being charged against the Medina Bank, in account. On June 3, 1861, C. J. Beach, a clerk in the Medina Bank, whilst in charge of the bank, pursuant to the directions of John M. Kennan, the cashier, but without any authority from either the president or cashier so to do, inclosed the note in question to the Merchants' Bank of Albany, and directed it to be placed to the credit of the Medina Bank. . . . The note was received by the defendant, but its cashier refused to enter the same for discount. He did, however, enter it for collection; and on the 5th wrote to the Medina Bank, acknowledging the receipt of the note, but stating that it had not been indorsed by the bank, complaining of it as a strange proceeding, and demanding authority to treat it as the property of the bank. No such authority was ever given." In that case the holder of the note was not a bona fide holder, and it was denied by the Bank of Medina that the person acting as assistant cashier had been given authority by either the president or the cashier of the bank to deliver the note to the holder thereof. The indorsement on the note was to the holder notice that the transaction was an unusual one, that there was something strange about the transaction, and the Merchants' Bank of Albany asked for authority from the Medina Bank to treat the note as its property, which authority was not given. It was not shown that, in the transaction of the business of the bank it became necessary for Beach, acting in the capacity of general manager in the absence of the cashier, to discount the note to the Merchants' Bank of Albany, or for him to depart from the course that had been practiced by the bank for ten years prior thereto in sending notes to said bank for collection only; whereas, in the case at bar, the plaintiff is the holder of the draft for value, having obtained it from the assistant cashier of the Citizens' Bank in a transaction that daily occurred between said banks, and received it without any notice whatever of Forbes' equities or of Dugan's lack of authority to make such transfer, and the bank itself, acting through its receiver, in its answer admits the authority of Dugan to make such transfer.

A careful review of the record discloses no error for which the case should be reversed, and the judgment of the lower court is affirmed.

WILLIAMS, C. J., and DUNN, TURNER, and KANE, JJ., concurring.

Digitized by Google

Decision No. 1090.

LANNING v. JOHNSON et al.

(Supreme Court of New Jersey. April 2, 1908.)

69 Atl. 490.

CORPORATIONS — REPRESENTATION BY OFFICERS — PURCHASE OF NOTE — FRAUD — NOTICE TO OFFICER.

The president and director of a trust company, who was also a director of a bank, induced other directors of the bank to execute a note on the pretense that the bank was temporarily in need of funds, and on the condition that the note was not to be discounted until the signatures of the other directors of the bank had been attached to the note. He caused the note to be discounted by the trust company without procuring the additional signatures, and without consultation with the other directors of the company. Held, that the company was entitled to recover on the note; it not being bound by the knowledge of its president and director.

Action by John E. Lanning, receiver of the Monmouth Trust & Safe Deposit Company, against Samuel Johnson and others. There was a judgment for plaintiff. Heard on defendant's rule to show cause. Rule discharged.

Argued November term, 1907, before GUMMERE, C. J., and REED, J.

Edmund Wilson, for the rule. John S. Applegate & Son, contra.

GUMMERE, C. J. The plaintiff sued as the receiver of the Monmouth Trust & Safe Deposit Company to recover the amount due upon a certain promissory note for $10,000 held by the insolvent company, and signed by the defendant. The case was tried before the court without a jury by consent of parties, and the proofs disclosed the folowing facts: That the note was made at the instance of one Twining, who was a co-director with the makers of the note of the First National Bank of Aubury Park, and also president and a director of the trust company; that Twining obtained the signatures of the defendants to the note upon the pretense that the bank was temporarily in need of funds to carry it over until it received returns from its discounts in other banks, and upon the express condition and agreement with the defendants that the note was not to be discounted or used unless, and until the signatures of the other directors of the bank, some five in number, were procured and attached to the note; that Twining, notwithstanding his agreement with the defendants, caused the note to be discounted by the trust company without the additional signatures of the remaining directors being first obtained; that the discounting was done by Twining as president of the company without consultation with his board of directors; and that the right to do so had not been conferred upon him by the board, either expressly or by knowingly permitting him to exercise a like power on previous occasions, or by ratifying or acquiescing in its exercise by him. On these facts the trial court found in favor of the plaintiff.

It is now contended on behalf of the defendant that the conduct of

Digitized by Google

Twining in procuring the note to be discounted without first obtaining the signatures of the other directors of the bank was a fraud upon the defendant; that the knowledge of Twining of the fact that the note was fraudulently being put into circulation was attributable to the trust company because of the fact that he acted for it in the matter of the discount; and that, therefore, the makers of the note are not liable to the receiver. That the fraud of Twining in presenting the note for discount without procuring the signatures of all the directors of the bank renders it void, if the trust company took it with notice of the fraud, is conceded. The only question is whether his knowledge is attributable to the trust company.

It has frequently been declared in other jurisdictions that there is a distinction between knowledge of illegality, or want of consideration of a note by a director who acts with his board in discounting it and such knowledge on the part of a director who is not present and acting with the board when the discount is made; and that in the former case the bank is bound by his knowledge, and in the latter case it is not. Many of the cases so holding will be found collected in the opinion of Depue, J., in First National Bank of Hightstown v. Christopher, 40 N. J. Law, 435, 29 Am. Rep. 262. It is upon the principle which is considered to underlie this distinction that the defendants rest their claim of non-liability. But the distinction claimed to exist has been condemned, as we understand the opinions hereafter referred to, by our Court of Errors and Appeals. In the case of Sooy v. State, 41 N. J. Law, 394, the sureties upon the bond of a State treasurer sought to escape liability for his defalcations upon the ground that the Legislature had knowledge, at the time of the execution and delivery of the bond, that the treasurer was then a defaulter, and that it had failed to communicate this fact to the sureties. Such knowledge on the part of the Legislature was attempted to be shown by proving that the fact had been communicated to one of the members of that body. It was decided that, "in a matter wherein the Legislature properly acts as an agent of the State, notice to members of the Legislature individually is not notice to the State. Such notice, to bind the State, must be given to one of the legislative branches in organized session." The underlying rule upon which this decision was rested is stated in the opinion to be that the knowledge of the agent is chargeable upon the principal only when the principal, if acting for himself, would have received notice of the matters known to the agent. In the late case of Vulcan Detinning Co. v. American Can Co., (N. J. Err. & App.) 67 Atl. 339, the same court affirmed the rule laid down in Sooy v. State, and held that the defendant company was chargeable with knowledge of facts acquired by its president while a director of the complainant company only so far as it would itself have acquired such knowledge by dealing directly, or through another agent, with the complainant company concerning the subject-matter of the controversy. At the same time it expressly repudiated the doctrine laid down by us in the earlier case of Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788, viz., that where information is casually obtained by an agent of a corporation, and the corporation afterwards acts through such agent in a matter where the information possessed by him is pertinent, the knowledge of the agent will be imputed to the principal. On the strength of those two cases, therefore, it would

Digitized by Google

seem that, if the note in controversy had been discounted by the board of directors of the trust company while Twining was present as a member thereof, the trust company would not be chargeable with notice of his fraudulent conduct in procuring its discount. But the fact that the note was discounted, not by the board of directors, but by Twining himself, he taking advantage of his position as president to usurp the function of the board without authority from them, makes it unnecessary to determine the question discussed; for it can hardly be held that, where a transaction takes place without either the knowledge or authority of the board, the board is chargeable with notice of facts known to their self-constituted agent, but not communicated by him to them.

The rule to show cause will be discharged.

Decision No. 1091.

JONES et al. v. JACKSON.

(Supreme Court of Arkansas. April 27, 1908.)

110 S. W. 215.

BILLS AND NOTES — BONA FIDE PURCHASER — NOTICE OF EQUITIES.

Where a purchaser of notes for value before maturity before purchasing had knowledge that the maker denied liability and of circumstances indicating fraud in the contraction of the debt for which the notes were given, he was not a bona fide purchaser.

Appeal from Circuit Court, Sharp county; J. W. Meek, Judge.

Action by R. M. Jackson against Thos. W. Jones and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

The suit was instituted March 7, 1906, on a note, negotiable in form, executed to W. E. Smith, May 8, 1905, for $519.25, due February 1, 1906, indorsed in blank by Smith. Plaintiff alleged that on the 16th of May, 1905, before the maturity of the note, plaintiff in due course of trade and for value became the owner and holder of the note, and was still such owner and holder. Defendants filed separate answers, which were substantially alike. The answers, while admitting the execution of the note, denied that it was executed for value received by any one, or that plaintiff became the owner thereof by purchase from Smith, or otherwise in due course of trade for a valuable consideration, and that any sum was due thereon as interest. The answer also averred that the note was obtained by Smith through fraud, false pretenses, and intimidation, in that on April 20, 1905, Smith reported that he was agent for S. E. McNeill for the sale of a fresh and salable stock of general merchandise; that he induced defendants, who had no experience in mercantile business, to go and inspect the stock, which they found in McNeill's possession in a poorly lighted store; that the best goods were shown to them by daylight, while the cloth-

Digitized by Google

ing, jewelry, trimmings, and the damaged and old goods were shown to them at night by very poor light; that defendants were unable to detect defects in the goods by the opportunities they had, and that Smith and McNeill told them they were all new goods and salable, which he believed; that Smith also represented that he was selling the goods to defendants at 25 per cent. below first cost, and that the invoice showed the goods to be worth more than $2,000; that defendants were compelled to take the word of Smith and McNeill for the wholesale price of the goods, which in fact had been marked up on an average of 25 per cent. above first cost, and that some of the goods were fifteen to twenty years old; that, after deducting 25 per cent. and throwing out a few old things, the price amounted to $1,586.25, and defendants were induced to execute two notes to McNeill, one for $400, April 28, 1905, payable sixty days after date, when a few of the goods had been invoiced, and was induced to give a mortgage on personal property to secure it; that on the next day, by certain promises, fraudulent representations, and threats, defendants were induced to execute another note for $667, and for the remainder of the goods the note sued on, for $519.25, with the defendant A. J. Wilson as personal security. The answer further alleged that, after Smith and McNeill had induced the execution of the first note and mortgage, they refused to make good any of the defects, and, when the goods reached the depot at Hardy, Smith threatened to attach them for the balance and not allow defendants to haul them out until the note sued on was executed and delivered to him; that when the goods were purchased Smith guaranteed them to be good, mercantable, and unincumbered, when in fact, with but few exceptions, the goods were old and moth-eaten, and incumbered by a mortgage to the Edward Stanwood Shoe Company for $406.90, which had not been satisfied; that McNeill immediately assigned the notes to Schenck & Son; and that when defendants ascertained the fraud they notified Smith that he would not pay the note sued upon, and also notified Jackson that Smith had perpetrated a fraud on him in obtaining the note and selling the goods, and before plaintiff traded or pretended to trade for the note plaintiff was informed that it would not be paid. The answer also alleged a tender of the remainder of the goods, and that defendants had long since paid the other notes, and that a large part of the proceeds of the goods went to satisfy the mortgage to the shoe company.

David L. King, for appellants. Sam H. Davidson, for appellee.

HILL, C. J. Thos. W. Jones, as principal, and J. A. Wilson, as surety, executed a note for $519.25 to W. E. Smith. Smith assigned the note to R. M. Jackson, who sued Jones and Wilson upon it. Jones and Wilson filed separate answers, which were substantially the same. The substance of the answers will be set out by the reporter in the statement of facts, and it will be seen therefrom that the defense was based upon the alleged fraudulent sale of a stock of goods by Smith to Jones, and that Jackson was not an innocent purchaser of the note, and had knowledge of the fraud perpetrated upon Jones by Smith. The court sustained motions to make the complaint more specific and certain; and, after amendments, sustained demurrers to all of the answers, except a substitute for paragraph 2, which admitted the

Digitized by Google

assignment of the note from Smith to Jackson, and denied that the date it was assigned was the date shown on the note, and alleged that it was not made before maturity, and that Jackson did not become the owner in due course of trade, and denied that the assignment was made for value, and denied that Jackson was the owner. That was the only defense left to Jones. Judgment was obtained on the note, and Jones and his surety appealed.

It is insisted that the bill of exceptions does not show that it was filed within the time allowed for it to be made a part of the record. This is true; but the court finds it unnecessary to consider the bill of exceptions, for the record shows the sustaining of the demurrers to the answer and the exceptions thereto, which were properly preserved, and such record presents a question for review without the need of a bill of exceptions. Bush v. P. & N. W. Ry. Co., 76 Ark. 497, 89 S. W. 86. The answers set forth evidentiary matters that are not proper in pleading, and they cannot be commended as examples of good code pleading; but, when taken as a whole, they sufficiently charge fraud in the sale of the goods to make a good defense between the vendor and vendee under the principles which were reviewed and announced in Mason v. Thornton, 74 Ark. 46, 84 S. W. 1048. It seems that the lower court sustained the demurrers because the allegations were not sufficient to connect the fraud in the sale with the holder of the note. The allegations, in substance, charge that Jackson had notice of the fraud, false pretense, and intimidation perpetrated upon the defendant by Smith, and that Jackson was informed that the note was fraudulently obtained, and was without consideration, and warned not to buy or trade for the same, and all the circumstances and fraud practiced on Smith in obtaining said note, and also that Smith would not pay it. Counsel for appellee argues that these allegations do not present a defense, because they do not allege that the holder of the note participated in the acts complained of or in the fraudulent transfer of the instrument, or bad faith on his part in the purchase of it, and relies upon Thompson v. Love, 61 Ark. 81, 32 S. W. 65, to sustain him. That was a suit upon a note given to a hedge fence company. Its execution was admitted, and the defense made that it was fraudulently procured and the holder was not a bona fide purchaser. There was evidence to sustain the allegation of fraud in the procurement of the note. The case turned on whether the purchaser was a bona fide purchaser. The only evidence bringing notice home to him was information which he received to the effect that the makers of this and other similar notes were solvent and good for their contracts, but that the payee of these notes had agreed not to sell them. The court, following Burke v. Dulaney, 153 U. S. 233, 14 Sup. Ct. 816, 38 L. Ed. 698, correctly decided that this was insufficient to make the purchaser a mala fide holder.

The court has had occasion recently to re-examine the principles of Burke v. Dulaney, and has again approved them, in Graham v. Remmel, 76 Ark. 140, 88 S. W. 899. It is unquestionably true that mere notice of a promise not to negotiate a note does not prevent a purchaser for value in due course of trade being a bona fide purchaser, for he must have knowledge, not of some oral contemporaneous promise, which is inadmissible in evidence, but of something wrong with the paper itself. This notice, actual or constructive, must be

Digitized by Google

that there is some fraud or equity or illegality affecting the original parties. Tiedeman on Commercial Paper, § 300; 1 Daniel on Negotiable Instruments (5th ed.), § 799; Old Nat. Bank of Ft. Wayne v. Marcy, 79 Ark. 149, 95 S. W. 145. Following the excerpt from Burke v. Dulaney, the court in Thompson v. Love, then made a quotation from Tiedeman on Commercial Paper, § 289, concluding as folows: "But the great weight of authority in this country, as well as reason, supports the contrary doctrine, that the bona fide character of a holder can only be destroyed by proof of his participation in a fraudulent transfer of the instrument." This quotation is from the discussion as to what constitutes bona fides in a purchaser. There was a conflict, or rather a progress, in the English decisions on the subject. One rule was laid down by Lord Kenyon, subsequently overruled by Lord Chief Justice Abbott (Lord Tenterden), and this was, in turn, modified and finally overruled by Lord Denman, when he was Chief Justice, and the rule as first announced by Lord Kenyon amplified and established. Chancellor Kent, when he wrote his Commentaries, stated the law as it then existed, following the cases then prevailing in England, but which were afterwards overruled; and his text has been followed by some of the courts, but in most instances overruled later, making the rules substantially the same on both sides of the water. This subject is treated more fully in Daniel on Negotiable Instruments (5th ed.), §§ 770, 776. It was reviewed and explained in Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857, which case has been followed very generally by State, as well as federal, courts. See the notes to it in 6 Rose Notes, 388, 394. The discussion was as to what should constitute mala fides — negligence, gross negligence, suspicious circumstances, or participation in the original fraud or fraudulent transfer, etc. The discussion was not as to the notice which was necessary to bring home to the party sought to be charged knowledge of fraud. That matter is considered in another section of Tiedeman on Commercial Paper (section 300), and concludes as follows: "Finally, it is not necessary that the purchaser should have notice of the particular defense or defect, in order to be charged with constructive notice. It is sufficient if he has a general notice that there is something wrong with the paper. But, if he makes inquiry bona fide and to the extent of his ability, without substantiating the general notice of defect, he can claim the protection of a bona fide holder." Mr. Daniel says: "It is quite clear and well settled that the purchaser need not have notice of the particular fraud or equity or illegality, in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is some fraud or equity or illegality affecting the original parties. . . . So, if he knows, the maker denies his liability or refuses to acknowledge it." 1 Daniel on Negotiable Instruments (5th ed.), § 799. The foregoing statement of the principles was adopted by this court recently in the case of Old Nat. Bank of Ft. Wayne v. Marcy, 79 Ark. 149, 95 S. W. 145. The statement from Tiedeman's text, quoted in Thompson v. Love, when detached from the statement that notice of something wrong with the paper is sufficient to charge the purchaser with notice, is misleading; but, when considered in connection with it, is correct. It was error for the court to sustain these demurrers, for the answers alleged that the purchaser had knowledge that the makers denied

Digitized by Google

liability and of circumstances tending to show fraud in the contraction of the debt which the notes evidenced before he purchased the paper for value before its maturity. These facts, if proved, would make him a mala fide, and not a bona fide, purchaser.

Reversed and remanded.

Decision No. 1092.

STATE BANK OF GOTHENBURG v. CARROLL et al.

(Supreme Court of Nebraska. April 23, 1908.)

116 N. W. 276.

APPEAL — REVIEW — OBJECTIONS NOT RAISED BELOW — LIMITATION OF ACTIONS — SUBSTITUTION OF NEW PLAINTIFF — BILLS AND NOTES — PRESENTATION OF CHECK — DELAY — NEGLIGENCE IN PRESENATION — EVIDENCE — HARMLESS ERROR — INSTRUCTIONS.

1. This court will not review the ruling of the District Court permitting a third party to be substituted in lieu of the original plaintiff, where no exception has been taken to such ruling.

2. The substitution of a third party for the original plaintiff in an action is not the commencement of a new action, and the statute of limitations is not available as a defense, if the original action was begun before the bar of the statute was complete.

3. Mere delay on the part of the holder of a check in presenting it for payment to the bank on which it is drawn will not release the drawer and indorser of the check from liability, unless such delay caused a loss.

4. Evidence examined and set out in the opinion held to require a verdict for the plaintiff.

5. This court will not review any alleged errors in the giving and refusing of instructions, where the evidence compelled the verdict which was rendered.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Dawson county; Hostetler, Judge.

Action by the State Bank of Gothenburg against T. L. Carroll and the Union Pacific Railroad Company. Judgment for plaintiff, and defendants appeal. Affirmed.

E. A. Cook, for appellants. Warrington & Stewart and H. M. Sinclair, for appellee.

GOOD, C. This action was originally instituted by H. V. Temple, as receiver of the State Bank of Gothenburg, against Thomas L. Carroll and the Union Pacific Railroad Company to recover the amount of a check drawn upon the People's State Bank of Gothenburg by Carroll in favor of an agent of the Union Pacific Railroad Company, which had been indorsed and transferred by the railroad company to the State Bank of Gothenburg. The People's State Bank of Gothenburg closed its doors before the check was presented to it for payment. Subsequently the State Bank of Gothenburg passed

Digitized by Google

into the hands of a receiver, who instituted this action to recover upon the check. Answers were filed and a trial had, resulting in judgment in favor of the defendants. This judgment of the District Court was reversed by this court in Temple v. Carroll, 105 N. W. 989. After the cause was remanded to the District Court, the State Bank of Gothenburg was substituted as plaintiff in the action, and filed an amended and substituted petition. Defendants answered separately. Carroll pleaded the statute of limitations, denied that the plaintiff had succeeded to the rights of Temple, receiver, and averred that at the time the check was given he had funds in the bank upon which it was drawn more than sufficient to pay the same, and alleged that plaintiff was negligent in failing to present the check to the bank upon which it was drawn until after it had suspended payment, and that, by reason of such negligence, he was exonerated from liability upon the check. The defendant railroad company's answer was substantially the same, except that it did not deny the right of the plaintiff to be substituted for the original plaintiff. Plaintiff replied to both answers with a general denial. A trial resulted in a verdict and judgment for the plaintiff. The defendants have appealed.

The principal grounds for reversal relied upon by the appellants are: First. That plaintiff cannot maintain the action, as a substituted plaintiff. Second. The statute of limitations. Third. The insufficiency of the evidence to sustain the verdict. Fourth. Alleged error in the instructions.

With reference to the first question, the record shows that upon the 8th day of October, 1906, the State Bank of Gothenburg, upon application to the court, was given leave to be substituted as plaintiff in the action in the place of H. V. Temple, receiver, and to file a petition in the cause. Defendants were each given leave to file a separate answer thereto. There is nothing in the record to show what evidence or reason was given to the court for substituting the bank in place of the receiver as plaintiff in the action. It was conceded on the oral argument, however, that the receiver had been discharged, and the bank had resumed its functions as a banking institution. But appellants insist that it is essential that the record should show some ground, or some reason, for making the substitution, and that, in the absence of such a showing, the plaintiff cannot maintain the action. When the record is silent, the presumption obtains in favor of the regularity of the court's procedure, and that a proper and sufficient showing was made. As no exception was taken to the order permitting the substitution, this court will not review the ruling of the court thereon.

The plea of the statute of limitations was based upon the theory and assumption that the filing by the substituted plaintiff of an amended and substituted petition was the commencement of a new action, and that, more than five years having elapsed prior to the filing of such petition, the action was barred. It is conceded that the original action was begun previous to the running of the statute. We think the rule is generally well settled that the substitution of one party plaintiff for another in a pending action is a continuation of the original rather than the commencement of a new action. It is the same cause of action. Only another party has succeeded to the rights of one of the litigants, and in our practice such party may be sub-

Digitized by Google

stituted as the real party in interest in lieu of the one who commenced the action. Since the statute of limitations had not run at the commencement of the original action, it follows that it can be no defense in this action.

The evidence discloses that on the afternoon of the 27th day of May, 1901, the Union Pacific Railroad Company received the check in controversy in payment of a freight bill. Through its agent the check was indorsed and transferred to the plaintiff after banking hours on that day, and the agent received Omaha exchange in payment of the check. The usual banking hours in Gothenburg were from 9 A. M. to 4 P. M. The evidence also tends to show that the banks sometimes opened a little earlier and kept open a little later, at least for the transaction of some lines of business. On the following morning Carlson, the president of the State Bank, before banking hours, learned that the State bank examiner was in Gothenburg, and he had some reason to believe that the People's State bank might be in financial difficulties. Shortly after 8 o'clock Carlson went to his own bank, and about 8.30 took the check in question, and went to the People's Bank to present it for payment. That bank was not then open. He then went to a barber shop, and later returned to the People's Bank to present the check. He claims that it was about 9 o'clock when he returned. The evidence of defendant tends to show that it was about ten o'clock. At this time payment of the check was refused, and Carlson was informed that the bank was under the control of the State bank examiner. Carlson did not return to his own bank from the time he left it at about 8.30 until after he had been refused payment of the check. During Carlson's absence from his bank an employee of the People's Bank, under the direction of the State bank examiner, took certain checks held by that bank and drawn upon Carlson's bank to the latter bank, and received the money thereon. At the same time he made inquiry as to whether the State Bank held any checks drawn against the People's Bank. The employee at the State Bank, not having any knowledge of the check in the hands of its president, informed the representative of the People's Bank that it had no checks against it. The evidence shows that it was the usual custom of the banks to "clear" each day between the hours of 3 and 4 in the afternoon. The appellants contend that, if the president of the plaintiff bank had left this check in the State Bank, it would have been paid by the representative of the People's Bank when the checks were presented by him for clearing, or that, if the president had notified the other employees of the State Bank that he had the check, it would have been paid by the People's Bank out of funds then in its possession. Under this state of affairs, the appellants claim that the appellee was negligent, and that by reason of its negligence the check was not paid, and therefore they should be relieved of any liability. Carroll at the time had a much larger sum on deposit in the People's Bank than the amount of his check. It is conceded that the check has not been paid, and the appellants are liable thereon, unless they are relieved by some act of negligence on the part of the plaintiff. Let us analyze the evidence, and see whether any negligence exists. In the first place, the check could not have been presented on the 27th day of May, because it was not received until after banking

Digitized by Google

hours. It being the usual custom of the banks to clear between 3 and 4 o'clock in the afternoon, plaintiff could not anticipate, and had no reason to anticipate that any representative of the People's Bank would attempt to clear with it in the early forenoon. Under these circumstances, it could not to our minds be considered an act of negligence on the part of plaintiff for its president to take the check out of the bank. It does appear that he was using due diligence to present the check promptly to the People's Bank, and that he was there knocking at the door before the usual time of opening. According to his testimony, he was there at the usual time of opening and gained admission, but did not obtain payment. But, taking the evidence most unfavorable to the plaintiff, he did present the check as early as 10 o'clock, and was refused payment. Under these circumstances, we think the evidence would not sustain any charge of negligence. But, beyond this, the rule of law is well recognized that, to predicate a right of recovery or defense upon the negligence of another, such negligence must be the proximate cause of the injury. The evidence in this case does not show that, if the check had been in the plaintiff bank when the representative of the People's Bank presented checks against it, it would have been paid. We think the inference is to the contrary, because the evidence shows that the employee of the People's Bank went to the plaintiff bank pursuant to the directions of the bank examiner, who was then in charge of the People's State Bank. He was collecting the assets that belonged to the People's Bank. He certainly had no authority, and no right to pay out the funds of the bank after he had taken charge. He would have no right to prefer one creditor over another, and we cannot assume that he would have done so. Again, the evidence does not show that the People's Bank was ever open for business or ever paid a check or demand upon it after the time the check came into the possession of the plaintiff. Under these circumstances, even if it should be conceded that the plaintiff was negligent, the appellants in this case were not in any wise injured thereby. Under this evidence, we think that only one verdict could have been properly rendered, and that was in favor of the plaintiff in the action. The evidence is not only sufficient to sustain the verdict, but it is such as to preclude any other verdict. In this view of the case, it is unnecessary to consider any instructions that may have been given. Whether erroneous or not, they were not prejudicial. It follows that the judgment of the District Court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the District Court is affirmed.

Digitized by Google

Decision No. 1093.

REILLY v. McKINNON.

RYNKIEVICZ v. SAME.

(Circuit Court of Appeals, Third Circuit. February 5, 1908.)

159 Fed. 78.

BILLS AND NOTES — ACTION ON NOTE — MISREPRESENTATION — EVIDENCE — SUFFICIENCY — BONA FIDE HOLDERS.

1. Evidence in an action on notes given to plaintiff's transferrer for corporate stock bought from the company's president's agent, defended on the ground of misrepresentation in the sale of the stock, held insufficient to show that plaintiff took the notes with knowledge of the illegal fraudulent representations, or with such notice of the facts and circumstances attending their execution that his acceptance must have been made in actual bad faith, though he was a director of the company and a member of the executive committee which placed the matter of the sale of the stock in the hands of the president.

2. One may be a bona fide holder of commercial paper and entitled to protection as such though he knew of circumstances that might excite suspicion in the mind of a cautious person or though he were grossly negligent at the time of the transfer; the test is, did he act in bad faith?

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

See 145 Fed. 863.

George L. Crawford, for plaintiff in error. C. E. Morgan, 3d, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. The above cases were tried together below by agreement of counsel, and a verdict in each case was directed for the plaintiff by the learned trial judge. From the judgments thereon entered, writs of error were duly taken to this court where the cases have been argued together. McKinnon was the plaintiff below in both actions, and the original defendants therein were John A. Reilly and Joseph Rynkievicz, but, during the pendency of the suit against Reilly, he died, and his executrix, Mary A. Reilly, was thereupon substituted as a defendant in his stead.

The facts in brief are as follows: Two promissory notes made by said Reilly and Rynkievicz, respectively, to the International Mercantile Agency, in payment or part payment of shares of its stock, which the makers of the notes had bought through an agent of its president, were, before maturity, negotiated by the corporation as part of the collateral security for a loan of $30,000, made to it by McKinnon. McKinnon was a director of the corporation, not only then, but during substantially all the period of its existence, and also a member of its executive committee, which was composed of directors of the company and had power to act in their absence. At the time the notes in

Digitized by Google

suit were made, McKinnon owned $50,000 in par value of the preferred stock of the company. He had previously owned $50,000 in par value of the common stock which he had received from McCauley, its president, and which he subsequently sold and applied the proceeds to the purchase of the preferred stock. The stock which the defendants bought was part of a subsequent issue of $1,000,000 par value, which had been authorized by the directors, and placed by the executive committee in the hands of McCauley for sale upon a commission of three-fourths of the net proceeds of sale, in excess of $50 per share; which amount per share was to be received by the company before any commissions were allowed or paid for the sale of the stock. The sale for which the notes were given appears to have been made by an agent of McCauley's at $125 per share. The defense to the notes is based upon fraudulent misrepresentations as to the assets and condition of the corporation alleged to have been made by the agent to the defendants at the time of the sale. Representations made at that time were testified to, but whether they were shown to be false by competent testimony is open to question. Many of the representations testified to may fairly be regarded as an exaggerated puffing of the stock and an exploitation of the probable future of the corporation. The representation more particularly relied upon, however, was to the effect that the company had at that time $500,000 in its treasury. An attempt to show that that statement was false was made by the production of what was claimed to be the cash book of the company, which purported to show the monthly cash balances of the corporation at and about the time when the alleged misrepresentation was made. The proof identifying this cash book as that of the corporation is uncertain. Beyond the fact that it purported to be such, and that it came directly from its trustee in bankruptcy, through an assistant district attorney of New York, there is no proof whatever of its genuineness; furthermore, there is no evidence to show by whom or how the book was kept, whether correctly or incorrectly, whether the entries were complete or incomplete, what the system of bookkeeping was, or whether or not there were any other cash book or books of the company covering the same period of time. The learned trial judge only tentatively admitted the book in evidence, but we deem it unnecessary to pass upon the question of its admissibility, since the testimony does not show that the plaintiff was a party to or in any wise connected with or cognizant of either the above or any other of the alleged fraudulent misrepresentations. Considerable testimony was offered concerning the organization and early history of the corporation. It is somewhat difficult, however, on account of its remoteness from the transactions in question, to perceive its relevancy, but, from the argument of counsel for the plaintiffs in error, it may be gathered that it was intended to show thereby that the corporation was inherently weak, unstable, and in need of funds from its inception, and that a large proportion of its stock was issued for property which had been very greatly overvalued, of all of which the plaintiff was, or should have been, aware, and hence that he was, from the outset, engaged in a fraudulent conspiracy or combination. There is, indeed, sufficient evidence in the case to arouse suspicion, and engender serious doubts of the stability and ultimate success of the corporation,

Digitized by Google

and we have no disposition whatever to justify much that was done during the organization and existence of this corporation. But that is not the vital question in the case. If these notes are void, they are void because they were obtained through fraud, not only, but fraud which has been satisfactorily brought home to the plaintiff. Bad faith on his part must appear. There is apparently no question that the plaintiff made the loan of $30,000 to the company, and accepted the notes now in suit, with other notes, as collateral security for the payment of the corporation's note to him for $30,000, and that the loan remains unpaid. The transaction just referred to was completed a few weeks before the bankruptcy of the corporation. There is not a word in the testimony, however, which, in our opinion, directly or indirectly connects the plaintiff with the fraudulent misrepresentations which were made to the defendants. That he was a director of the company and a member of the executive committee which placed the matter of the sale of the stock in the hands of the president is wholly insufficient for that purpose; those facts are entirely consistent, or at least are not inconsistent, with good faith on his part. Wakeman v. Dalley, Impleaded, etc., 51 N. Y. 27, 10 Am. Rep. 551; Richmond Railway Company v. Dick, 52 Fed. 379, 3 C. C. A. 149. Furthermore, there is no evidence to show that he even knew the price at which the stock was sold to the plaintiffs in error. His own evidence is that he did not know, although he admits that he thought the notes, from their size, might have been given in payment for stock; manifestly, however, such knowledge, if possessed, would not afford him any idea of the price at which the stock had been sold, since, so far as appears, he did not know how many shares either of the defendants had bought, or whether the notes they gave were given for the whole or a portion only of the purchase price, and without these factors it is manifest he could not even conjecture the price.

The corporation was organized to carry on a commercial agency of a character somewhat similar to those of Dunn and Bradstreet, and its first issue of stock was made to McCauley for the transfer of the assets and good will of other similar corporations, which, however, for the most part, had proved to be failures; such an enterprise was necessarily to some extent speculative, and of such a character that to insure its success considerable capital would naturally have to be advanced without any immediate prospect of remunerative return. At all events, the evidence does not conclusively show that the corporation was organized as a fraudulent concern, or for the purpose merely of making money by the sale of its stock. So far as appears, it may have been honestly conceived, and under proper management might have had a reasonably prosperous career. Indeed, only a few months before its failure, a committee of the directors was appointed for the special purpose of investigating its affairs, which having been done, the committee made a flattering report of its prospects which was communicated to the plaintiff, in common with the other stockholders of the company. But, as already stated, whatever the character of the company may have been, there is no evidence of a fraudulent conspiracy or any evidence to show that the plaintiff took the notes in question with knowledge of the alleged frudulent representations, or with such notice of the facts and circumstances

Digitized by Google

attending their execution that his acceptance of them must be deemed to have been done in actual bad faith. He was ignorant of the entire transaction. One may be a bona fide holder of commercial paper and entitled to protection as such, notwithstanding he had knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even though he were grossly negligent at the time of the transfer; the test is, did he act in bad faith? This is generally accepted law, and might be supported by a multitude of cases; reference, however, will be made to a few only. In Murray v. Lardner, 2 Wall. 110, at page 121, 17 L. Ed. 857, the Supreme Court says:

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part."

And again in Hotchkiss v. National Bank, 21 Wall. 354, 22 L. Ed. 645, the same court, at page 359 (22 L. Ed. 645), lays down the rule in the following language:

"The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title."

In Clark v. Evans et al., 66 Fed. 263, 13 C. C. A. 433, the Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the court below because the trial judge charged the jury that "if you further believe that the plaintiff . . . had knowledge of such facts as would put a prudent man on inquiry, and that inquiry, if prosecuted, would have led to a knowledge of the fraud, then you will find for the defendant." In its opinion the Court of Appeals said:

"The charge was erroneous. 'Knowledge of such facts as would put a prudent man on inquiry' would not affect the right of the plaintiff to recover if she was otherwise a bona fide holder for value. One who purchases a negotiable note for value before maturity does not owe the maker the duty of making active inquiry into the origin or consideration of the note, before purchasing the same. His right to recover can only be defeated by showing that he had actual notice of the facts which impeach the validity of the paper. 'Knowledge of such facts as would put a prudent man on inquiry' will not suffice."

In Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934, a charge to a jury very similar to the above was held to be erroneous, and the judgment below reversed on that ground. King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84, and Battles et al. v. Laudenslager, 84 Pa. 446, are illuminative of the case at bar, as well as of the point under consideration. We think the trial judge was entirely warranted in directing, as he did, verdicts in favor of the plaintiff. Any other course would have been unwarranted.

The judgments below will be affirmed, with costs.

Digitized by Google

Decision No. 1094.

BENTLEY v. BROSSARD et al.

(Supreme Court of Utah. March 6, 1908.)

94 Pac. 736.

PARTNERSHIP — CREATION OF REQUISITES — NATURE OF RELATION — COMMUNITY OF INTEREST IN PROFITS AND LOSSES — SHARING OF PROFITS — MINES AND MINERALS — MINING PARTNERSHIP — THE RELATION — CREATION AND EXISTENCE — INTENT OF PARTIES — COMMUNITY OF INTEREST IN PROFITS — CONTRACTS — LEASES — CONSTRUCTION OF MINING LEASES — ASSIGNMENT — EQUITABLE ASSIGNMENT — "MINING PARTNERSHIPS" — DISTINCTIONS BETWEEN "MINING AD TRADING PARTNERSHIPS" — RIGHTS AND LIABILITIES OF PARTNERS — MUTUAL AGENCY — OPERATION OF MINES — RIGHTS INCIDENT TO WORKING — ACTIONS FOR LABOR — EVIDENCE — SUFFICIENCY — TRIAL — VERDICT — DISREGARD OF INSTRUCTION.

1. In order to constitute a "partnership" the members must join together to carry on an adventure for their common benefit, each contributing property or services, and having a community of interest in the profits.

2. Though there is no express agreement in a partnership contract to share losses, an agreement to share profits amounts prima facie to an agreement to share losses also.

3. Defendant B. agreed with the owner to work and develop mines belonging to the latter. B. to furnish the necessary labor, etc., and to be entitled to half the profits, which were to be divided after they had reached a certain amount, when he was to receive a half interest in the mine, and was also entitled, under the contract, to purchase a half interest therein for a certain sum at any time. B. and the other defendants thereafter entered into a contract by which they contributed various amounts to enable them to work the mine for the purpose of securing the option and other rights to which B. was entitled under his contract with the owner; B. agreeing to convey to the other defendant an interest, proportionate to their respective contributions, in the half interest in the mine to which he was entitled under his contract, to pay to them a share of the profits in the mine out of the undivided half thereof to which he was entitled in proportion to their contributions, and to return to them any part of the money contributed which was not used in developing the mines. Held, that the agreement between B. and the other defendant created the relation of partnership.

4. If parties make such stipulations as in law constitute a partnership, they will be liable as partners, though they did not intend to render themselves liable as such, and an agreement that they shall not be liable as partners is immaterial.

5. While a community of interest in the profits is not of itself conclusive of the existence of a partnership, it is of the very essence of the contract, and a partnership cannot exist without it.

6. Where defendant B. obtained a lease to mines by which he was to work the mine and receive half of the profits and a half interest therein, with a privilege of buying a half interest therein for a stated price at any time during the lease, and thereafter entered into an agreement with the other defendants by which they were to contribute certain amounts to develop the mines, and B. agreed to give them an interest in his share of the profits, and to convey to them an interest in his share

Digitized by Google

in the mine under his contract with the owner, B.'s contract with the other defendants was, between themselves, an equitable assignment of the lease, and it was immaterial, as between B. and the other defendants, that his contract with the owner stipulated that he could not assign or sublet the lease, since that provision was for the benefit of the owner.

7. A "mining partnership" may exist, though all of the partners may not have a personal interest in the property, if they have an interest in the working of the property, and it is not essential that there be an express agreement to become partners, or an express agreement to share profits and losses, as that is an incident to the prosecution of the general business.

8. The principal distinctions between a "trading partnership and a mining partnership" are that a member of the latter may assign his interest without the consent of his co-partner, and neither the assignment of a partner's interest nor the death of a partner works a dissolution to the partnership; that the assignee of an interest in the partnership becomes a partner without the assent of the other partners, and a member of a mining partnership has not the power to bind his associates by engagements with third persons to the same extent as a member of a trading partnership.

9. A mining partnership is not founded on the delectus personæ of the members, and the powers of the members or managers of mining partnerships are limited to the performance of such acts in the name of the partnership as may be necessary to the transaction of its business, or are usual in like concerns, unless there is an express agreement to the contrary known to the party dealing with the member, and hence such partner may not borrow money, employ counsel, execute notes, etc., on behalf of the partnership.

10. The employment by the managing partner of defendant mining partnership of plaintiff, a mining engineer, together with other laborers, for the purpose of developing the property, was necessary to the transaction of the business, and usual in like concerns, and hence was within the implied power of such partner, and binding upon the firm.

11. The proof of agency among alleged partners does not show the existence of a partnership, since the mutual agency of the partners result from the existence of the partnership, and not the partnership from the fact of agency.

12. In an action against defendants as mining partners, the evidence held to show that defendant B. did not direct the working of certain mines for his individual benefit, but for the benefit of all of defendants.

13. Instructions to a jury are the law of the case, which the jury must follow whether they consider such instructions correct or not, or whether the instructions are in fact correct; and, where a verdict is in disregard of instructions, it should be set aside by the trial court.

McCarty, C. J., dissenting.

Appeal from District Court, Cache County; J. A. Howell, Presiding Judge.

Action by W. H. Bentley against A. Brossard and others. From a judgment for a part of defendants, plaintiff appeals. Reversed and remanded for new trial.

Booth, Lee & Badger, for appellant. Hart & Nebeker, for respondents.

STRAUP, J. This action was brought to recover the sum of $212 alleged to be due plaintiff from the defendants for labor performed on certain mining claims operated by the defendants. It is alleged

Digitized by Google

in the complaint that the defendants entered into a contract in writing whereby they associated themselves together as co-partners for the purpose of developing, improving, and operating certain mining claims, naming them, known as the "Wakefield Group of Mines," situate near Tuscarora, Nev., and for the purpose of extracting ore therefrom; that the defendants entered upon the work of developing and operating the properties and in carrying on mining operations thereon under their contract of partnership; that the plaintiff was employed by the defendants as an engineer to work upon the properties, and that in the course of his employment he performed labor thereon between the 1st day of August and the 23d day of September, 1903, at the agreed price of $4 per day; that there was due him and owing from the defendants and each of them the sum of $212. The defendants A. F. and O. A. Caldwell were not served with process, and no appearance was made by them. The other defendants answered, pleading the general issue. A trial was had before the court and a jury.

Some of the defendants reside at Logan, Utah, and the others in southern Idaho. The defendant Brossard, who had examined the group of mines, spoke to the other defendants about them. Thereupon Brossard, in October or November, went to Tuscarora, and there negotiated with L. Fannof, the owner of the group, for a lease, upon substantially the following terms: That Fannof was to deliver possession of the property to Brossard, who was to work and develop the claims in such manner as Brossard deemed proper; that Brossard was permitted to sell all the ores obtained from the mines while working them under the lease, and that the money received therefor should be disposed of as hereinafter stated; that Brossard should employ at least six men every twenty-four hours, and that three men should be kept at work on said mines each day, and three men each night; that the property should be worked in a workmanlike manner, etc., and that Fannof should not be responsible for the payment of the labor employed or material furnished, etc.; that all moneys derived from the sale of ores should be deposited with the First National Bank at Logan, and should be subject to the check or draft of Brossard, and that he should be permitted to use so much thereof as was necessary to pay all expenses, etc., and that all moneys derived from the sale of ores in excess of the expenses should be equally divided between Brossard and Fannof; that if the moneys derived from the sale of ores were not sufficient to pay for all the expenditures, etc., Brossard was required to pay them, and that Fannof was in no way to be held responsible therefor; that the moneys in excess of the expenses were to be kept and allowed to remain in the bank until the sum amounted to $20,000, when it was to be equally divided between them, in which event Fannof was required by a good and sufficient deed to convey to Brossard an undivided one-half interest in and to the group of mines; that Brossard also had the option at any time within the life of the contract to purchase an undivided one-half interest in and to the group for the sum of $10,000, and on the payment of which sum Fannof was also required to execute a conveyance to him of such undivided one-half interest; that the contract was to continue so long as the work was being performed under the terms of the contract,

Digitized by Google

and until the conveyance of the one-half interest was made; that Brossard was given the right to abandon the work under the contract at any time; that if steam power should be used upon the property Fannof was to be employed as engineer at current wages; and that Brossard could not sublet or assign the contract without the consent of Fannof in writing. The contract contained other matters of minor importance not necessary here to mention. Shortly after the terms of this contract were agreed upon, but before the contract was signed, Brossard returned to Logan, and there exhibited a copy of the contract to the other defendants. Thereupon the defendants above named, in the early part of December, 1902, entered into the following contract:

"This agreement made and entered into at Logan City, Utah, between A. Brossard, the first party, and the other defendants abovenamed, second parties, witnesseth: That whereas the first party has leased from L. Fannof of Tuscarora, Nev., mining claims situated in the said Tuscarora mining district, State of Nevada [naming them]; and whereas it is deemed advisable and agreed by the parties hereto that the sum of $5,000 shall be furnished for the development of the said mining claims and the carrying out of the said contract when completed by the first party therein and the said L. Fannof for the development of the said mining claims and for earning and securing the option in said contract set forth: Now, therefore, it is hereby agreed by the parties hereto that they will respectively furnish amounts aggregating the sum of $5,000 in respective amounts as follows, to wit, the said A. Brossard the sum of $1,000, the said Jacob West the sum of $1,000, the said R. A. Caldwell the sum of $1,000, the said A. F. Caldwell the sum of $1,000, the said J. M. Blair the sum of $5,00, the said Mattie B. Hanson the sum of $250, and the said Orin A. Caldwell the sum of $250. And it is agreed by the parties hereto that in pursuance of his contract with L. Fannof of the undivided one-half of the said mining claims as in said contract stipulated that the said first party will convey to the second parties hereto an undivided interest in the said mining claims in proportion to the amounts invested by the parties herein as above set forth, that is to say, to the said Jacob West the one-tenth undivided part of each and all of the said mining claims, to the said R. A. Cldwell the one-tenth of each and all of the said mining claims, to A. F. Caldwell the undivided one-tenth of each and all of the said mining claims, to the said J. M. Blair the undivided one-twentieth of each and all of the said mining claims, to the said Mattie B. Hanson an undivided one-fortieth in each and all of the said mining claims, and to Orin A. Caldwell an undivided one-fortieth in each and all of the said mining claims. And the said first party hereby agrees that if the said sum of $5,000, or any part thereof should not be needed for the development work on the said mining claims for the reason that the moneys derived from sale of ores obtained from working said mining claims should pay the expense or part of the expense in developing said mining claims, that in any such event the first party will return to the second parties all such parts and proportions of the said sum of $5,000 remaining unused, or if used temporarily, then refunded or reimbursed from sale of ores, as the second parties shall be entitled to, pro rata, according to the amounts advanced

Digitized by Google

and paid into this enterprise as heretofore set forth. And the first party hereby further agrees that according to the terms of said contract with L. Fannof any moneys that shall remain on hand to be divided between the said L. Fannof and the first party in accordance with their said contract that the said first party will pay to each of the second parties the proportion of all such moneys received by him as the said amount furnished by the second parties as aforesaid bears to the whole sum of $5,000, as aforesaid; that is to say. that each of the parties of this contract shall receive his pro rata share according to the part of the said moneys which shall be furnished by him in accordance with this contract of all moneys that may come to the said first party in pursuance of his said contract with L. Fannof."

At about the time of the making of the foregoing contract, and before the lease between Brossard and Fannof was actually signed, R. A. Caldwell, West, Blair, Hanson, and Brossard, contributed $3,000. Brossard then departed for Nevada, and thereafter the lease was signed and executed on the 13th day of December, 1902. Brossard thereupon took possession of the properties and commenced work on the 15th day of December, 1902, and with the moneys contributed and paid over to him he employed men, purchased supplies, etc., and commenced active operations. The work consisted in sinking shafts, running tunnels, and making cross-cuts in search of ores. In March, 1903, $2,000 more was contributed by the same parties and A. F. Caldwell. In May $2,500, and in June, 1903, an additional sum of $2,500, were contributed by the same parties and some others who had come into the association, making, in all, a total contribution of about $10,000. The record does not disclose the amount contributed by each, nor do we regard such fact material, in view of the issues presented by the pleadings and the questions involved in the case. The operation of the mines was continued until some time in September, 1903. All of the moneys contributed were used in paying men, in buying supplies, and in working and developing the mines. Brossard had charge of the work, and directed and controlled the supervision of it, and employed the men, and purchased the supplies. The record further shows that no pay ore was found, and that in July Brossard called upon some of the parties for additional contributions, but it is not clear that he called on any of them, except A. F. Caldwell and a Mr. Pike, who became a party to the agreement in March, 1903. However, no further contributions were made. The evidence further shows that R. A. Caldwell visited the properties four or five different times, especially in July and in August, 1903, when he was there about a month, inspecting and examining the workings. He was also at the property and remained there when Brossard left in September. While the operations were being carried on Brossard saw the several defendants and explained to them, especially to R. A. Caldwell and West, the location of the veins, where the ore beds were supposed to be, the sinking of the shafts, the running of the crosscuts, the purchase of a pump, etc., and other workings and operations of the mine R. A. Caldwell testified that before the contract of the defendants was signed, "Brossard had seen me in regard to the mining venture, and had told me about this group of claims. He told me

Digitized by Google

he had a chance to get a contract on them. He stated the terms of the contract as near as I can remember. With that understanding, and with the representations of Mr. Brossard that he could get a contract with Fannof, I signed the contract with Mr. Brossard, and put up the money on the contract. Mr. Brossard had a contract with Fannof in his possession, but it was not signed." He further testified that he paid the money for the development of the property, and so that Brossard could comply with his contract with Fannof, and so that he (Caldwell) could get something in the future. It was further testified to by Fannof, and in part corroborated by other witnesses, that R. A. Caldwell at the mines stated that Brossard represented him and others, and that he was interested in the property; that it cost him $55 a day to run the mine; that had Brossard put up his share as he had agreed to do there was no necessity of owing anything at the mine. Fannof also testified that West stated that Brossard had been sent to the property by himself and others, and that he had not carried out instructions, and that, if things could be arranged satisfactorily, money would be put up to pay the bills, and the work would be resumed. Plaintiff also gave evidence tending to show that he was employed at the instance and request of Brossard and R. A. Caldwell. Defendants R. A. Caldwell and West denied that they had employed plaintiff, or that they had stated that Brossard represented them, or that he had been sent to the property by them. It is further shown that after the working of the mines had stopped, and in November, 1903, the defendants and Fannof met several times and discussed propositions of forming a corporation to take over the unpaid bills and to resume work, but nothing resulted from such meetings. It was conceded by the defendants that the plaintiff was employed by Brossard, and that he rendered services as an engineer in and about the workings and operations of the mines, and that the value of his services was as alleged in the complaint, and that he had not been paid.

At the conclusion of the evidence the court charged the jury that no verdict could be rendered against the defendants A. F. and O. A. Caldwell because they had not been served with process, and directed them to return a verdict in favor of the defendant Hanson because her name had been signed to the agreement without authority, and in favor of defendant Blair because he had sold and parted with his interest prior to the employment of the plaintiff and the rendition of his services. The court directed a verdict in favor of plaintiff and against the defendant Brossard. As to the liability of the defendants West and R. A. Caldwell, the court submitted the case to the jury on instructions that, if they found the defendants were partners, to render a verdict for the plaintiff against those two defendants also; otherwise, to find in their favor. The jury found in favor of defendants West and R. A. Caldwell; hence this appeal by plaintiff from that part of the judgment.

Among other instructions the court charged the jury as follows:

"(5) Partnership is thus sometimes defined as the relation existing between two or more persons who have contracted together to share as co-owners the profits of a business carried on by all or any of them on behalf of all of them. You are further instructed that.

Digitized by Google

where the business so engaged in is the working of a mine or of a mining prospect to test its value under an option to purchase it, a mining partnership exists, and that such partnership may be created by the acts of the parties without an express contract formally designating themselves as partners. Two things are necessary to create a mining partnership: (a) An agreement between the parties to so associate themselves together to work the property; and (b) actually undertaking the work of mining operations thereon. It is not necessary under such circumstances that the parties should be the owners of the legal title to the property to constitute them mining partners.

"(6) If you find by a preponderance of the evidence that the defendants, or any of them, so associated themselves together for the purpose of causing mining operations upon the property described in the complaint, and co-operated for that purpose, the profits of the business, if any, to inure to all as co-owners and to be shared accordingly, and by authority of those so associated, actual working of the property was in fact carried on, then a mining co-partnership was created between the defendants so associating and co-operating, and they would be liable for the debts incurred in carrying on such mining operations."

"(9) You are instructed that a member of a mining partnership has full power to make such contracts as are usual and necessary in the ordinary course of working a mine, such as to purchase supplies and materials for working the mine, and to employ the necessary help in carrying on its operations, and the right to incur debts for necessary supplies furnished to the mine, and for the payment of the laborers and other employees necessarily engaged therein, and all the members of the mining partnership are bound by his acts as to all such matters.

"(10) You are instructed that a superintendent, foreman, or managing agent of a mining partnership, when duly authorized by the partnership or one of its members, has authority to bind them by his acts in carrying on the working of the mine, in the employment of laborers and other necessary employees, and in purchasing supplies and materials for actual use in the working of a mine. You are further instructed that when a mining partnership in fact exists it is not necessary that a creditor furnishing supplies or materials for the working of the mine, or a laborer or other employee working therein, should know the names of all the partners; but when such a partnership is shown to exist by competent evidence all the partners are bound for the claims of the rightful creditors of the partnership, whether such creditors know they are partners or not."

"(12) You are instructed that when a mining partnership has been proven to exist any special limitation upon the powers of the partners, which they attempt to make by agreement among themselves, does not affect or restrict the power of each partner to bind the partnership in the usual course of business, except as to persons who know of the limitation, and the burden of showing knowledge of such alleged limitation is upon the parties claiming it."

The jury were further instructed that in ascertaining whether the relation of the defendants constituted a partnership they should

Digitized by Google

consider all the facts and circumstances, and if, from a consideration thereof, they found "that there was no intent on the part of said defendants to enter into a co-partnership relation, and that such relation did not exist between them, or any of them, and the defendant Brossard, then the court charges you that your verdict must be in favor of the defendants Jacob West and R. A. Caldwell." The court further instructed the jury that the written agreement between Brossard and the other defendants did not in and of itself constitute a partnership; that the fact that the defendants contributed to the expenses connected with operating the group of mines was not in and of itself proof of partnership; that the fact that the defendants, under certain circumstances, were to share in the profits, if any, to be derived from the operation of the mines, was not in and of itself sufficient to prove partnership; and that the payment of money by the other defendants to the defendant Brossard to be used in the development of the mining property did not in and of itself, and independently of other proof, constitute the relation of co-partners.

Various assignments of errors are made, among them that the verdict is contrary to the evidence, and is against the law, and that the court erred in charging the jury that the written contract of the defendants did not constitute the relation of partnership; in charging that a verdict must be rendered in favor of the defendants West and R. A. Caldwell, unless the relation of partnership was found to exist; in charging that the contributions made by the defendants to defray the expenses in operating and working the group of mines, and the payment of money by them for the development and carrying on the workings and operations of the property, and the agreement to share in the profits, if any, by the defendants resulting from such operations, did not constitute a co-partnership; and in admitting certain testimony of the defendants that they never received any money or profits, or a conveyance, or other thing of value, from Brossard in pursuance of their contract, and that they gave Brossard no directions as to the employment of men or the conduct of the work.

The principal questions involved have, to a large extent, been discussed together by counsel in their briefs and in the oral argument. It is not necessary for us to review these questions separately. We are of the opinion that the court erred in charging the jury that the written contract of the defendants did not constitute the relation of partnership. It is not essential to inquire into the requisites of a general or trading partnership beyond the principles of law which are in common with such a partnership and a mining partnership. As to the general principles involved, and particularly applicable to the case, we find no better statement of the rule than that of Mr. Justice Gray in the case of Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, as follows: "The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits." After reviewing the authorities it was further observed by him: "In the present state of the law upon this subject it may perhaps be doubted whether any more precise general rule

Digitized by Google

can be laid down than as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership."

It is sometimes said that an obligation to share losses is an essential element to the existence of a partnership. While an obligation to share losses is not directly expressed in the agreement, still it has been quite generally held that an agreement to share profits, nothing being said about losses, amounts prima facie to an agreement to share losses also. 1 Lindl. on Partn. (Elwell ed.) 30. The contract executed by the defendants recites: "That whereas the first party [Brossard] has leased from L. Fannof mining claims [naming them]; and whereas it is deemed advisable and agreed by the parties hereto that the sum of $5,000 shall be furnished for the development of said mining claims and the carrying out of the said contract when completed by the first party therein and the said L. Fannof for the development of the said mining claims, and for earning and securing the option in said contract set forth: Now, therefore, it is hereby agreed by the parties hereto, etc." It is thus seen that the lease between Brossard and Fannof was not only the inducement for the making of the contract between the defendants, but was the very subject-matter of their agreement, and, by sufficient reference, was in effect made a part thereof. To therefore arrive at a correct meaning of the defendants' contract, and to properly understand it, it must be read in connection with the lease. The object of entering into their contract was to work and develop the group of mines in accordance with the terms of the lease, and for the purpose of obtaining whatever benefits and advantages that might be derived therefrom. Such was the adventure undertaken by them and the purpose for which they associated themselves together. Their undertaking to develop and work the property was not for the benefit of Brossard alone, but was for the common benefit of all the parties to the contract. They, then, agreed as to the amounts of money that should be contributed by each. Each party was to receive a pro rata share of the moneys derived from the sale of ores over and above the expenses of operation, and in proportion to the amount contributed by each; and likewise each was to share in like proportion to an interest in and to the property itself in the event of a successful operation and of earning and securing the option provided for in the lease. They, therefore, had a community of interest in whatever profits that were to be obtained. We thus have every requisite of a partnership, and a case where the parties

Digitized by Google

in clear and unambiguous terms have, in the language of Mr. Justice Gray, joined together on an adventure, for their common benefit, each contributing money, and having a community of interest in the profits. When the writings are read, how can it be said that these defendants did not join together upon an adventure to work and develop the group of mines mentioned in the lease and under the terms and conditions as therein specified? That such joining together was not for their common benefit? That the contributions made were not for the purpose of working and developing the claims, of obtaining whatever ores that might be found from the explorations, of acquiring an interest in the property, if found valuable, and were not in furtherance of the very objects for which the parties associated themselves together? That they did not have a community of interest in whatever profits to be derived from the adventure? The terms of these contracts were precise and explicit. The language was clear and unequivocal. There was nothing doubtful or ambiguous about them which required explanation by resorting to extraneous circumstances. The court ought to have held that the agreement of the defendants created the relation of partnership.

When the trial court permitted the jury to determine from all the evidence and curcumstances whether the defendants had intended to assume the relation of partnership towards each other, it also committed error. True it is sometimes said that to constitute a partnership the parties must have intended to create such relation. "But," as was said by the court in the case of Fleming v. Lay, 109 Fed. 952, 48 C. C. A. 748, "by this it is meant to say they must have intended to make such stipulations as in law constitute a partnership, and not that they intended the conclusion without regard to the conditions upon which it results as matter of law." And, as said by Mr. Lindley in his work on partnership, "if they have in fact stipulated for all the rights of partners, an agreement that they shall not be partners is a useless protest against the consequences of their real agreement." 1 Lindl. Partn. (5th ed.) 11.

Counsel for respondent has strongly urged that "there was no common ownership nor joint proprietorship in the business;" that Brossard alone had an interest in the lease; and that the respondents had no present estate or interest in the lease or in the claims, and that they had only the promise of Brossard to do something in the future. We need but to refer back to the statement of the rule as made by Mr. Justice Gray as to the requisites of a partnership to point out the fallacy of counsel's position. To be a partner one must of course have an interest in carrying on the business or adventure, and must have a common ownership of, or a community of interest in, the profits of the business. While a community of interest in the profits is not alone conclusive of the existence of a partnership, it nevertheless is of the very essence of the contract of partnership, for without it a partnership cannot exist in contemplation of law. Furthermore each party here had, not only an interest in carrying on the business or adventure, but also a common ownership in the business itself. Though the lease was in the name of Brossard alone, nevertheless the contract of the defendants, as between themselves, had the effect of an equitable assignment of the lease, and gave each of the parties to the contract an equitable interest in the lease as fully as though an

Digitized by Google

express agreement had been made by the parties that Brossard should obtain the lease in his own name, for the use and benefit of all of the parties. Under the arrangement of the parties, had large and valuable ore bodies been found and the proceeds thereof had exceeded the expenses of operation, equity would have given all the parties to the contract an interest therein, and would have compelled Brossard to account to his co-defendants therefor; and, if sufficient proceeds over and above expenses had been obtained to earn the option according to the provisions of the lease, equity likewise would have given them an interest, in accordance with the terms of their contract, in and to the property itself. The provision in the lease that Brossard should not sublet nor assign it without the consent of Fannof in writing was for the benefit of Fannof. It could not be made available by Brossard, as between himself and his co-defendants, in a refusal to account for the proceeds, or to otherwise carry out his contract with them. The position of counsel is rendered still more untenable when it is considered that the kind of partnership created by the defendants was that of a mining partnership. In 27 Cyc. 755, it is said: "A mining partnership arises when two or more co-owners of a mining claim actually engage in working the same, and share, according to the interest of each, in the profit and loss, although there is no express agreement between them to become partners, or to share the profits and losses. Such a partnership is not restricted, however, solely to cases where the mine is owned by the parties working it, if they have an interest in working it or in carrying on mining operations. It can be formed either to prospect for and locate mines, or to work mines belonging to other persons, or to any or all of the individual members." In speaking of mining partnerships, Mr. Lindley, in his work on Mines (volume 2, § 798), says: "Such a partnership may exist as well where the parties have an interest in the working of the mine in carrying on mining operations as where they own the mine itself." In 2 Snyder on Mines, § 501 et seq., is found a full discussion of what constitutes a mining partnership, the distinction between such a partnership and a co-tenancy, or an ordinary trading or general partnership. See, also, notes to case of G. V. B. Min. Co. v. Bank, 95 Fed. 35, 35 C. C. A. 515. In the case of Manville v. Parks, 7 Colo. 128, 2 Pac. 212, the question was directly before the court. It was there said: "It is evident that a mining partnership may exist as well where the parties have an interest merely in the working of a mine, or in carrying on mining operations, as where they own the mine itself." To the same effect are the following cases: Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455; Hartney v. Gosling, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. Rep. 1005; Ashenfelter v. Williams, 7 Colo. App. 332, 43 Pac. 664; Settembre v. Putnam, 30 Cal. 490; Dunlap v. Pattison, 4 Idaho, 473, 42 Pac. 504, 95 Am. St. Rep. 140; Southmayd v. Southmayd, 4 Mont. 100, 5 Pac. 318; Haskins v. Curran, 4 Idaho, 573, 43 Pac. 559. The facts in the case of Meagher v. Reed, supra, are very similar to the facts of the case in hand. There Meagher obtained a lease from the owners of the claims in his own name. The property was worked under the lease, and developed by himself and his associates, who had no interest whatever in the properties, except as they had an interest in the lease through an agreement with Meagher, and because thereof were interested in the work-

Digitized by Google

ing of the mine and the profits to be derived therefrom, and were to acquire undivided interests therein in case of successful development and operations. True Meagher had agreed to assign an undivided interest to his associates in and to the lease when obtained from the owners, while here there was no such express agreement on the part of Brossard, but where nevertheless his contract with his associates operated as an equitable assignment of an interest in the lease and gave them an equitable interest therein. At any rate, by Brossard in his contract with his associates agreeing to convey to them specified undivided interests in and to the mining property itself acquired in pursuance of the lease, and to pay to them pro rata shares of the proceeds of ores over and above expenses, gave them an interest in and to the claims and the business quite as much as though he had merely agreed to assign to them an interest in the lease, and certainly gave them an interest in the working of the properties and in carrying on the mining operations. From the foregoing authorities it will thus be seen that the rule is well established that a mining partnership may exist between persons, although all of them may not have a direct or present interest in and to the properties themselves, if they have an interest in the working of the property or in carrying on the mining operations. It is not even essential that there should be an express agreement to become partners, or an express stipulation to share profits and losses, as that is an incident to the prosecution of the general business. Duryea v. Burt, 28 Cal. 569; 2 Lindl. on Mines, § 797.

Again, referring to the contract of defendants, it seems quite clear that they associated themselves together to work and develop the group of mines in question for their common benefit; that each had an interest in and to the lease, and in working and developing the properties, and in carrying on the mining operations; and that each had a community interest in whatever profits that were to be derived from such operations. The agreement, under all the authorities, contains every requisite of a mining partnership. Quite true a distinction is made, and is well recognized by the cases and the text-writers, between such a partnership and an ordinary trading or general partnership. The principal distinctions are that a member of a mining partnership may assign his interest without the consent of his copartners, and the act does not work a dissolution of the partnership; that the person to whom the interest is assigned becomes a member of the company, and it is not necessary that the other parties consent thereto. Neither does the death of a member dissolve the partnership. Another distinction is that a member of a mining partnership has not the power to bind his associates by engagements with third persons to the extent that a member of a trading or commercial firm may do. For instance, the law does not imply any authority to a member of a mining partnership to borrow money, to employ counsel, to execute a promissory note, or to draw or accept bills of exchange, no matter how pressing the necessity for the use of the money. The reason assigned for the distinction, and for limiting the powers of members of a mining partnership, is that such a partnership is not founded on the delectus personæ, whereas other partnerships are. For these reasons it is held that the powers of members or managers of mining partnerships are limited to the performance of such acts in

Digitized by Google

the name of the partnership as may be necessary to the transaction of its business, or which are usual in like concerns. But a partner can bind the firm by acts in the name of the partnership in such matters as may be necessary to the transaction of the business, or which are usual in like concerns, unless there is an express agreement to the contrary known to the party contracting with the firm. Except as to these distinctions, the law governing a mining partnership is not different from that applicable to ordinary commercial or trading partnerships. 2 Snyder on Mines, § 1526; 27 Cyc. 557-559; Skillman v. Lachman, 23 Cal. 199, 83 Am. Dec. 96; Kahn v. Smelting Co., 102 U. S. 641, 26 L. Ed. 266; Manville v. Parks, supra; Meagher v. Reed, supra; Charles v. Eshleman, 5 Colo. 107. The employment of the plaintiff by Brossard to do labor on the property was necessary to the transaction of the business, and was usual in like concerns, and was therefore within the implied powers of Brossard, and was binding on the other members of the firm. In that regard it may here be said, as was said by the court in Manville v. Parks, supra: "In this case the articles purchased of the plaintiff were essential to the carrying on of the business and the accomplishment of the purpose of defendants in working the mine, and the debt being created in the necessary and usual course of the business, and within the scope of the partnership adventure, the individual member who made the purchase had lawful authority to contract the debt, and to bind his co-partners thereby." And it must here be held, as was held in the case of Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735, that one member of a mining partnership has authority to employ laborers to work the mine and to bind the partnership for their wages.

It is also said by counsel that Brossard had the active management of the properties; that he employed the labor and purchased the material, directed and controlled all the work and operations at the mines; and that the respondents had not given him any authority or direction with regard to such matters. From this it is argued that the respondents were not principals in the business; that the relation of agency did not exist between them and Brossard, and therefore no partnership relation existed between them. As pointed out in the cases of Pooley v. Driver, 5 Ch. Div. 458, and Meehan v. Valentine, supra, the reference to agency as a test of partnership, as made in some of the cases, "was unfortunate, inasmuch as agency results from partnership, rather than partnership from agency." Says Mr. Justice Gray: "Such a test seems to give a synonym rather than a definition: another name for the conclusion, rather than a statement for the premises from which the conclusion is to be drawn." The proving of agency, as must be readily conceded, does not prove a partnership But from the proof of partnership agency at once results. It is a sort of agency of one person acting on behalf of the firm. "He does not act as agent, in the ordinary sense of the word, for the others, so as to bind the others. He acts on behalf of the firm of which they are members; and as he binds the firm, and acts on the part of the firm, he is properly treated as the agent of the firm." Pooley v. Driver, supra. Nor is the fact that Brossard had charge of the work and employed the labor and purchased the material significant or controlling under the circumstances of the case in determining whether the mining operations carried on were his individual business or the

Digitized by Google

joint business of himself and associates, for such delegation of power to a general manager or common agent is not an infrequent incident of the business of partnership. That the working of the mine was not his individual business, and the carrying on of the mining operations was not alone for his benefit but for the common benefit of all the parties to the contract, is conclusively shown by all evidence.

But aside from the consideration of the question that the court erred in instructing the jury that the contract of the defndants did not constitute a partnership, we think that the verdict of the jury was contrary to the evidence, and against the law of the case as given them by the court. In paragraph 5 the court charged the jury that where the business engaged in is the working of a mine, or of a mining prospect to test its value under an option to purchase it, a mining partnership exists, and that such partnership may be created by the acts of the parties without an express contract designating them as partners; that two things are necessary to create a mining partnership, (a) an agreement between the parties to associate themselves together to work the property, and (b) actually undertaking the work of mining operations thereon. And in other portions of the charge hereinbefore referred to, the court instructed the jury that a member of a mining partnership had the authority to employ necessary help in carrying on the operations, and to incur debts for the necessary supplies and material furnished, and that as to such matters all the members of a mining partnership were bound. Upon the facts assumed by the court, and upon which he told the jury that a mining partnership resulted, and as to the matters concerning which one member could bind his co-partners, there was no conflict in the evidence. Upon these instructions and upon the evidence there was but one verdict to be rendered by the jury, and that was a verdict in favor of the plaintiff, not only against Brossard, but against West and R. A. Caldwell as well. Plaintiff's employment by Brossard, and the rendition and value of his services, were conceded by all the defendants. Likewise there was no dispute that the defendants associated themselves together to work the property, or that they actually undertook the work of mining operations thereon. It appears from the testimony of the respondents themselves that they contributed the money to work and develop the mines, to carry out the lease between Brossard and Fannof, to test the value of the properties, and to obtain whatever benefits might be derived from such workings and operations. The verdict which the jury rendered in favor of the defendants West and Caldwell was in the very teeth of these instructions, and contrary to all the evidence. It was the right and duty of the court to instruct the jury in matters of law; and the jury, as matter of duty, were bound to follow it. If an instruction is wrong, the law assumes, as a necessary legal consequence, that the verdict is wrong, and sets it aside; but to permit a jury to exercise their own judgment, and to decide contrary to the direction of the court, is to create confusion and uncertainty in the law and to govern a case, not by known and established rules, but by a rule made for the occasion, and left to the whims and caprices of jurymen. Instructions to a jury are the law of the case for them to obey and follow, and it makes no difference whether they consider them correct or not, or whether in point of

Digitized by Google

fact they are correct. The court on the motion for a new trial should have set the verdict aside, and erred in not doing so.

For the foregoing reasons, the judgment of the court below is reversed, and the case remanded for a new trial, costs to appellant.

FRICK, J. I concur.

McCARTY, C. J. (dissenting). Plaintiff brought this action to recover from defendants the sum of $212 alleged to be due for labor performed on certain mining claims situated near Tuscarora, Nev., known as the "Wakefield Group." It is alleged in the complaint that the defendants, on or about March 11, 1903, at Logan City, Utah, entered into a contract in writing whereby they associated themselves together as mining partners for the purpose of developing and operating the group of mining claims mentioned, and that the defendants thereupon jointly entered upon the work of developing and operating said mining property under said contract of partnership; that plaintiff was employed by the defendants as an engineer to work upon said mining claims; and that he performed work thereon between August 1, 1903, and September 23, 1903, and that there is due him the sum of $212. The defendants who were served with process answered and denied the existence of the partnership.

It appears from the record that in October or November, 1902, at Tuscarora, one L. Fannof, who was the owner of said group of claims, agreed to lease them to A. Brossard, one of the defendants in this action. A draft of the lease was drawn up at that time, but not signed by the parties until December 13, 1902. The lease, which was for an indefinite period, provided, among other things, that Brossard should employ and keep at work six men a specified number of hours each day developing the property. It was further provided that the money, if any, derived from the sale of ore extracted from the mines during the life of the lease, should be deposited with the First National Bank at Logan, Utah, subject to the draft or check of Brossard as manager of the "Wakefield Mine." It was also stipulated that this money should first be expended by Brossard in defraying the expenses of the mine, and the balance, if any, should be allowed to remain and accumulate in said bank, and that when the money thus accumulated, after paying all expenses, amounted to $20,000, it should be equally divided between A. Brossard and L. Fannof. It was further agreed that Fannof would then convey to Brossard, by a good and sufficient deed, an undivided one-half interest in the group of mines in question. It was also agreed that Brossard should have an option to purchase said one-half interest in the property at any time during the life of the lease by paying therefor "the sum of $10,000 of his own individual funds, ... and that in such event any moneys that may have accumulated in said bank over and above the expenditures . . . shall be equally divided between the parties." It was further provided in the lease that Brossard should neither sublet nor assign the lease without first obtaining Fannof's consent in writing. It was also provided that when steam power was used to operate the machinery of the mine Fannof should "be employed as first engineer at the current wages paid for such work in Tuscarora mining district." (The record shows that steam power was used, and that Fannof was

Digitized by Google

employed as an engineer.) It was further provided in the lease that if Brossard desired at any time to stop work on the property and to terminate the lease he could do so, and the money on deposit in the bank, of any, derived from the sale of ores taken from the mines, after the payment of all expenses of development, should be divided equally between the parties.

This lease, which was written out, but, as stated, not signed, was taken by Brossard to Logan City, Utah, where most of the other defendants resided, and there presented to them with the proposition from Brossard that, if each of them would contribute a certain sum of money to be used by Brossard in the development of the mining claims covered by his lease, he, in return for the money so contributed, would, at some future time, convey to each of the parties contributing an interest in the property, provided he should, with the funds thus furnished him, succeed in making of the adventure a paying concern. This proposition was accepted by the other defendants. who immediately paid to Brossard $5,000. Brossard soon thereafter returned to Tuscarora, and he and Fannof signed the lease, a draft of which he had, as stated, shown to the other defendants. Brossard immediately thereafter took possession of the leased property, and, with the money he had received from his co-defendants, put up machinery, employed men, and began active operations thereon. The work consisted of sinking shafts, running tunnels, and making crosscuts in search for ore. About March 1, 1903, the funds which Brossard had received under the contract became exhausted, and he called upon the parties who had paid him the $5,000 for more money, and they again paid him $2,000. On March 11, 1903, an agreement containing the terms and conditions upon which the money was paid Brossard was drawn up and signed by him and the other defendants. The agreement, so far as material here, is set out in the prevailing opinion in this case. Contributions other than those mentioned in the agreement were made by the parties, the last of which was made about June 30, 1903. Brossard called on the parties for more money in July, 1903, but they failed to make any further payments. The entire amount contributed under the agreement was about $10,000. Brossard kept men at work on the property until September 23, 1903, but failed to find any ore, and was compelled, for the want of funds, to abandon the work and to throw up his lease. It appears that the expenses of working and operating the mines during the months of August and September were not paid.

The action was tried to a jury, who returned a verdict in favor of plaintiff and against A. Brossard, and against plaintiff and in favor of the defendants Jacob West and R. A. Caldwell, "no cause of action." The court directed a verdict in favor of Mattie B. Hanson and J. M. Blair. The defendants A. F. Caldwell and O. A. Caldwell were not served with summons, and did not appear in the action. This appeal is prosecuted against the defendants Jacob West and R. A. Caldwell only.

Appellant bases his right to recover from respondents on the ground that they were co-partners with defendant Brossard in the said mining operations, and that the services in question were rendered for the co-partnership. The court instructed the jury that the written agreement between A. Brossard and the other defendants did not

Digitized by Google

create the relationship of co-partners between them. Appellant assigns the giving of this instruction as error. It might be well to observe that respondents concede that the services referred to were rendered, and that the sum sued for is justly due appellant. Respondents, however, contend that Brossard alone was liable for the debt. The only question, therefore, presented by this appeal is, did the relationship of co-partners exist between Brossard and the respondents at the time the labor in question was performed? A partnership is defined to be "a business relation between two or more persons arising out of a contract by which they agree to unite their property, credit, skill, or influence in some business so that they may have a community of interest in such business, and usually divide the profits and losses between themselves in fixed proportions." 2 Page on Contracts, 937. In the case of Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465, Judge Cooly, in an able and exhaustive opinion on the law of partnership, says that a partnership is "a community of interests in some lawful commerce or business, for the conduct of which the parties are mutually principals of, and agents for, each other."

Some of the elements necessary to a partnership are wanting in the agreement entered into between Brossard and his co-defendants. There was no evidence introduced that tended to show that it was the intention of the parties to the agreement to form a partnership, nor do I think such intention can be reasonably inferred from the terms of the contract, especially when read and construed in connection with the lease. The agreement when thus read shows conclusively that neither repondents nor any of Brossard's other co-defendants acquired any interest whatever in the lease. The consideration, and the only consideration received by the parties for the money paid to Brossard under the contract, was his promise that he would, in case the venture proved a financial success, refund the money, deed to each of the parties a specified interest in the property, and pay to each a certain proportion of the fund provided for by the terms of his lease. Brossard was in no way subject to the control or dictation of respondents and the other defendants respecting the employment of laborers at the mine and the expenditure of the money in purchasing machinery and supplies necessary to the successful prosecution of the work under the lease. And neither respondents nor any of Brossard's other co-defendants had any authority to contract for or to purchase supplies to be used in operating the mines and to pay for the same by drawing against the funds which they had paid to Brossard. Their contract gave them no right whatever to direct how the money should be expended, or in what particular way the work should be prosecuted. They had no right to even go upon the property and enter the underground workings thereof without Brossard's consent. Nor could they compel him to suspend operations when the money paid him was exhausted. And they could not have prevented him from incurring the indebtedness for which they are sought to be held liable in this action. In fact, they had no more legal right under the contract to direct how the money should be expended, or how the work under the lease should be performed or prosecuted, than if they were not parties to the agreement, but were strangers to the entire transaction. Trus it is said in the opinion written by Mr.

Digitized by Google

Justice Straup that "plaintiff (appellant) also gave evidence tending to show that he was employed at the instance and request of Brossard and R. A. Caldwell." I do not so construe plaintiff's testimony when read in its entirety on this point. He said: "I know A. Brossard. Became acquainted with him in 1902. He . . . asked if I was an engineer, and if I would go to work for him. I also know R. A. Caldwell. Became acquainted with him about June or July, 1903. He (Caldwell) came over to the mine where I was at work (referring to the mine covered by the lease)." Again he says: "I was employed by A. Brossard to work on the Wakefield group of mines about January 10, 1903." On cross-examination he stated: "I did not nor do I know now who are the owners of the Wakefield group of mining claims, but understood that I was employed by A. Brossard, R. A. Caldwell and others furnishing the money for the same. From R. A. Caldwell I received my information at different time between the months of July and September, 1903 (this testimony was denied by Caldwell); from Mrs. A. Brossard in the month of July, 1903." He named several other persons from whom he acquired this information, none of whom are parties to the suit. Therefore I think his own evidence conclusively shows that he was not employed at the instance of R. A. Caldwell. He had been at work for Brossard five or six months before he met or became acquainted with Caldwell. The record further shows that the business was all done by Brossard in his own name. Another significant fact is that respondent's and Brossard's other co-defendants made their last payment June 30, 1903. Soon after this payment was made R. A. Caldwell came to Tuscarora and examined the property covered by the lease. He went into the mine twice and examined the underground workings. The evidence introduced on behalf of appellant shows that Caldwell stated to one Hobson, who was employed at the mine as timekeeper and bookkeeper, that he (Caldwell) "had put up money for the development of the Wakefield group of mines, . . . and that he had put up his last dollar for such work." This alleged conversation took place long before the indebtedness involved in this case was incurred. Notwithstanding Caldwell remained continuously in Tuscarora until after Brossard had abandoned his work and left the camp, neither appellant nor any of the other employees at the mine suggested to him that they intended to hold him responsible for their wages. In fact the only demand ever made on respondents by appellants was the bringing of this action.

The obligations created by the agreement were not joint, as appellant seems to contend, but several: that is, the amount that each of Brossard's co-defendants was to contribute, and the interest each party was to receive in the property, was fixed by the agreement. Neither of Brossard's co-defendants acquired any right or interest in the contribution of any other defendant, nor in any of the benefits to be derived therefrom. As stated by counsel for respondents in their brief, "the relationship among the defendants was as separate and several in character as if each of the defendants, with the exception of Brossard, had entered into a separate and distinct contract with him." When one of the parties to the agreement paid the amount he had covenanted to pay, the contract on his part was fully performed, and neither Brossard nor any of the other defendants had any further

Digitized by Google

claim against him. And, on the other hand, when the money advanced by the parties was all spent, and they failed to further contribute, Brossard's obligations to them under the agreement likewise terminated, and the contract gave him no authority to continue the work on the credit of his co-defendants. That such was the legal effect of the agreement is plain, because, as stated, Brossard's right to the possession of the property and to carry on the development work was derived from his lease from Fannof, and in no way depended upon his agreement with respondents. This lease he could not assign, neither could he sublet the property covered by it without the written consent of Fannof. By the terms of the lease Brossard was bound to keep a certain number of men at work on the property during the life of the lease, and when steam power was used to run the machinery of the mines Fannof was to be employed as chief or head engineer. These terms and conditions were fully understood by the other defendants when they entered into the contract in question with Brossard. They knew that under the terms of the lease the voluntary suspension of the work for any appreciable length of time gave Fannof the right to terminate the lease, and to repossess the property. Therefore it necessarily follows that Brossard, in operating the mines under the lease, could not, in any sense, have been the representative or agent of the defendants, for, as I have stated, they had no interest whatever in the lease. And furthermore Brossard could not, without the written consent of Fannof, which was not obtained, assign an interest to them.

The doctrine is fundamental that in a partnership each partner is an agent of his co-partners in all matters pertaining to the affairs of the partnership, and has implied authority to bind the firm in all matters within the scope of the business in which it was engaged. This principle is well illustrated by Mr. Parsons in his work on Partnership, § 83, in the following language: "The principle which lies at the foundation of the partners' liability is that every partner has full and absolute authority to bind all the partners by his acts or contracts, in relation to the business of the firm, in the same manner and to the same extent as if he held full powers of attorney from all the members. No principle is better established than this. It rests, not only on universal authority, but on obvious reason and necessity; because, if the rule were otherwise, a very large proportion of the advantages and facilities for which partnerships are formed would be lost." Tested by this doctrine, which is undoubtedly founded upon correct principles, it is plain that the agreement entered into by Brossard and the other defendants did not create the relationship of partners between them. Beecher v. Bush, supra; Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596.

By an examination of the cases cited in the opinion written by Mr. Justice Straup it will be seen that they adhere to and declare this same doctrine. If, however, the construction contended for by appellant of the contract under consideration is to be adopted and followed in this case, then we have here a partnership in which five of the six members comprising the firm had no voice whatever in conducting and carrying on the business of the partnership. They could not severally or collectively exercise any supervision over the other partner (Brossard) in his management of the business. In fact, as

Digitized by Google

I have hereinbefore stated, they did not have the right to even go upon the property to inspect the work as it progressed except by consent of Brossard. In other words, they were only so many figure-heads or dummies in the alleged partnership without any of the rights or privileges pertaining to the management and the carrying on of the partnership affairs with which the law clothes the several members of a partnership. In the opinion written by Mr. Justice Straup, it is said: "Furthermore, each party here had, not only an interest in the carrying on of the business or adventure, but also a common ownership in the business itself." Now, if each party "had a common ownership in the business," he acquired it by virtue of the lease and the contract entered into between himself, Brossard, and the other defendants. It could not have been by virtue of the lease, because the lease itself prohibited Brossard from parting with his interest or any part thereof without the written consent of Fannof, and this he did not obtain. The contract between Brossard, respondent, and the other defendants did not make them common owners in the business, because, as stated in the prevailing opinion, "it (the contract) must be read in connection with the lease." It is further said in the opinion that, "though the lease was in the name of Brossard alone, nevertheless the contract of the defendants, as between themselves, had the effect of an equitable assignment of the lease, and gave each of the parties to the contract an equitable interest in the lease." This, however, cannot be so. The contract between Brossard and his co-defendants provided that in case he (Brossard) should acquire title to an interest in the property as provided in the lease, he would, in consideration for the money furnished him, convey to each of the other defendants a specified interest in the property, and prorate between them the $10,000 he was to receive as his portion of the accumulations provided for in the lease. That neither Brossard nor respondents could have intended that they should acquire an interest in the Fannof lease is plain, because the provisions of the lease itself, as stated, precluded them from acquiring an interest therein. If Brossard at any time had quit work, neither respondents nor any of the other co-defendants could have gone into possession of the property and continued the work of development and thereby prevented a forfeiture of the lease by Fannof. To illustrate: Suppose that, after Brossard had taken possession of the property and commenced work thereon in conformity with the terms of the lease, Fannof had refused to permit him to continue in possession of the property, and had ejected him therefrom, and Brossard had brought suit to recover possession of the mining claims, is it not plain that respondents would have been neither necessary nor proper parties to the action? Why, certainly. All of which is incompatible with the theory advanced and claim made that respondents, by virtue of their contract with Brossard, acquired an equitable interest in the lease, and had a common ownership in the business.

There was some evidence introduced at the trial which tended to show that during the time appellant was at work on the mining claims in question respondent R. A. Caldwell visited the property and on several occasions stated to appellant that the work was being performed for himself and the other parties who had put money into the enterprise. This testimony, as hereinbefore stated, was denied

Digitized by Google

by Caldwell, and the jury, by their verdict, found against appellant on this point, and this court is concluded by the finding.

Reference is made to the fact that after Brossard had thrown up his lease and quit work Fannof met with respondents and others who had furnished funds with which to enable Brossard to carry on the work under his lease, and that there was some talk of organizing a corporation for the purpose of paying off the debts incurred by Brossard and to further develop the property. This, however, is no proof of the existence of a partnership, nor is it a circumstance tending to show that there was any intent on the part of the parties to form a partnership. Fannof, no doubt, was anxious to get what was due him from Brossard for work performed under the lease. At that time it had not, in effect, been judicially determined that notwithstanding respondents had nothing whatever to do with hiring Fannof, and were powerless to prevent his employment, nevertheless they are liable to him for the balance due on his wages; for it necessarily follows that, if respondents are liable to appellant for the balance due him for work on the mines covered by the lease, they are also liable to Fannof for the balance due him for his work.

Counsel for appellant, in their brief, have assumed that by the terms of the agreement Brossard and the other defendants were to share in the profits should any be realized from the undertaking; and upon this premise they have based the major part of their argument in support of their contention that the parties intended to, and did in fact, form a co-partnership for the purpose of developing the mines in question, and ultimately acquiring an interest therein. I do not think the agreement is open to this construction. As I have hereinbefore pointed out, Brossard, in consideration of the money advanced by his co-defendants, agreed to convey to each of them an interest in the property covered by his lease, repay the money so advanced, and to pay to each a certain proportion of the $10,000 he expected to receive as his share of the fund provided for in his contract with Fannof. In other words, Brossard agreed to sell, and each of the other parties to the contract agreed to purchase, a specified part of his (Brossard's) interest in the property when acquired by him under his agreement with Fannof. Suppose, for example, that the business had proved successful, and the hopes and anticipations of all the parties concerned respecting the productiveness of the property had been fully realized, and Brossard, on receipt of the title to a one-half interest in the property and the $10,000 mentioned, had refused to convey to each of the parties who had contributed to the fund and made it possible for him to develop the property an interest in the property, and had refused to pay to each a part of the $10,000 as provided in the agreement, is it not apparent that an action for specific performance of the contract would lie against him and in favor of each of the parties with whom he refused to settle? The agreement gave the respondents no interest whatever in the $20,000 accumulations provided for in the contract between Brossard and Fannof until after the distribution of this fund between Brossard and Fannof. Therefore, as I construe the agreement, no provision was made therein for the sharing of profits between Brossard and the other defendants, and the question of profits is in no way involved in this case.

Digitized by Google

The distinguishing features between mining and commercial partnerships are pointed out and elaborately discussed in the prevailing opinion. I recognize the difference between the two kinds or classes of partnerships as therein pointed out, but, as I view the case, these questions are not before us; that is, they are not involved in the case. No claims is made that because some of the parties to the agreement disposed of and assigned their interests therein to third parties the partnership, if one were created, was thereby dissolved. The important question presented by this appeal is, did the contract, when read and construed in connection with the lease, create the relationship of partners between Brossard and respondents? In the following cases the construction of contracts similar in character to the agreement under consideration was involved, and it was held in each case that a partnership was not created between the parties to the contract: Blair v. Schaeffer, (C. C.) 33 Fed. 218; Seymour v. Freer, 8 Wall. (U. S.) 202, 19 L. Ed. 306; Adams v. Funk, 53 Ill. 219.

In the case of Blair v. Schaeffer the contract in part provided that: "Whereas, by virtue of a certain contract made by Samuel C. Schaeffer . . . with P. Cardenas . . . . for the purchase of 36.47 acres of land in Jackson county, Missouri, . . . for which . . . Schaeffer was to pay the said Cardenas the sum of $21,882 . . . : Now it is agreed as said contract is made by said Schaeffer for said land and for prudential purposes that the same shall be conveyed by warranty deed to said Schaeffer, and that John I. Blair . . . has paid for the same by giving to said Schaeffer . . . the sum of $21,882 . . . to enable him to pay for said land." The contract further recited that Schaeffer had a contract for the purchase of other lands at the agreed price of $44,559, and that Blair had furnished the money with which to make the payments as they become due, "and for prudential reasons" a deed was obtained for the same in his (Schaeffer's) own name. It was further provided in the contract that: "Within four months after Schaeffer shall have obtained the title to said lands, or sooner, if desired by said Blair, said Schaeffer to make a warranty deed to said Blair for said lands. Now it is further agreed, for the mutual interest of said Blair and Schaeffer, it may be deemed advisable to obtain certain releases for pretended claims made by the Anthony heirs to said property, . . . which sum said Blair agrees to furnish," etc. "It is deemed for the mutual benefit of said Blair and Schaeffer that Schaeffer purchase sixty-nine acres of land from John S. West adjoining the above-described lands at a price not to exceed . . . $27,600, and to obtain a warranty deed therefor. . . . All money necessary to stake off lots, grade streets, advertising, office furniture, fixtures, and rent, and stationery, taxes, and such other expenses as may become necessary for the improvement and sale of said property, . . . shall be furnished by said Blair; said Schaeffer to receive and deduct five per cent. commission upon gross sales of all lots sold at the agreed price or over made by said Blair and Schaeffer. . . . When said Blair shall have been paid in cash for all money advanced and furnished by him for the purchase of said land and other moneys and the interest thereon as specified, then the remainder of the property shall belong sixty per cent. to said Blair, and forty

Digitized by Google

per cent. to said Schaeffer. . . ." The contract further provided that, if the remainder of the property was converted into money, then Blair should receive sixty per cent. and Schaeffer forty per cent. of the proceeds. In an elaborate and well-considered opinion the court held that the contract did not create a partnership.

In that case Schaeffer had a contract for the purchase of certain lands. So here Brossard had an option on certain mining property. In that case Blair was to furnish certain specified sums of money with which to purchase the lands covered by the contracts held by Schaeffer. So here each of the respondents was to pay Brossard a specified sum of money. In that case Blair was to be repaid the money advanced by him out of the proceeds of the sales of lands before Schaeffer could receive anything therefrom except the five per cent. commission provided for in the contract. So here the money paid by respondents and the other defendants was to be refunded out of the proceeds from the sale of ores, should any be extracted from the mine during the life of the contract, before there could be any division of profits between Brossard and Fannof. In that case the court held, and rightly so, that the relation of principal and agent existed between Blair and Schaeffer, whereas in this case no such relation was created between Brossard and respondents. Brossard went into possession of the mines under his lease, and, as I have hereinbefore observed, he was accountable to no one except Fannof as to the manner in which he prosecuted the work. His rights and obligations under the lease were in no way affected by his contract with respondents. During the life of his lease he could suspend and resume work at his pleasure, regardless of their wishes and demands. All of which is inconsistent with the theory that they were partners.

Counsel for respondents say in their briefs: "Assuming that the relation of partners did exist, it had been terminated before the obligation sued on was incurred." The pleadings do not present an issues of this kind. Nor was the case tried on the theory that a partnership had been formed, but was dissolved before the indebtedness in question was incurred. This court, therefore, cannot consider the question, notwithstanding there is some evidence in the record which tends to support counsel's contention on this point. I am of the opinion, however, that, since the case is to be reversed on the ground that a partnership existed, the District Court to which the case is remanded should be directed to allow respondents to amend their answer, and permit them to plead as a defense this alleged dissolution of the partnership, should they so desire.

For the reasons herein stated, I am of the opinion that the judgment of the lower court should be affirmed.

Digitized by Google

Decision No. 1095.

CHARNOCK v. JONES et al.

(Supreme Court of South Dakota. April 9, 1908.)

115 N. W. 1072.

BILLS AND NOTES — PAYMENT OF NOTE BY MISTAKE — EFFECT — SUBROGATION — PAYMENT OF ANOTHER'S DEBT WITHOUT AUTHORITY.

1. Where plaintiff paid defendant's note by mistake, the debt was extinguished, and the note being surrendered to plaintiff, a subsequent indorsement to plaintiff by the cashier of the bank to which the note was sent for collection did not authorize plaintiff to sue thereon as holder.

2. One who without authority, pays another's debt, is not entitled to subrogation.

Appeal from Circuit Court, Minnehaha County.

Action on a note by C. T. Charnock against Jonah Jones and another, co-partners as Jones & Dew. From a judgment for defendant Jones, who defended alone, plaintiff appeals. Affirmed.

Keith, Danforth & Keith, for appellant. Joe Kirby, for respondent.

FULLER, J. Upon all the evidence offered in support of this action on a promissory note purporting to have been executed by Jones & Dew, as co-partners, for $146.42 payable to the order of the Racine-Sattley Company, a non-resident corporation, the court directed a verdict in favor of Jonah Jones, who defended alone, and this appeal is from a judgment dismissing the complaint on its merits, and from an order overruling a motion for a new trial.

The note was indorsed by the payee, Racine-Sattley Company, to the Merchants' National Bank of Omaha, and by the president of that bank to the State Banking & Trust Company of Sioux Falls, by whom the collection was made and the proceeds remitted prior to its indorsement to appellant. While it is alleged in the complaint that he purchased the note in the regular course of business before maturity, and is still the owner and holder thereof, appellant's own testimony with reference to the transaction as narrated in the abstract is as follows: "On or about the 15th day of July, 1905, he purchased the interest of Jonah Jones in the firm of Jones & Dew, forming a partnership with Dew under the name of Charnock & Dew; that thereafter this plaintiff gave to the Racine-Sattley Company a note for about the same amount as the note in question; that his note fell due on or about the same time as the note upon which action is brought; that when the note in question fell due the same was presented to him by the State Banking & Trust Company of Sioux Falls, who held the same for collection and remittance, and asked payment; that he thought the note presented was the note which he had given to the said Racine-Sattley Company, and that he thereupon drew his check for the amount which he then supposed was due upon his note, and the note in question was delivered to him, he thinking it was his own note; that a few days later

Digitized by Google

his own note was presented for payment, and that he then discovered his mistake; that he immediately took the note in question to the State Banking & Trust Company and asked them to return his money, and that he was informed that it had been remitted; that as he had given them the money on the note in question he might as well own the note, and plaintiff consented, and that thereupon F. H. Hollister, cashier of said State Banking & Trust Company, indorsed and delivered said note to this plaintiff; that no part of it has been paid." It thus appears that the note was forwarded by its owner to the Sioux Falls bank for collection, but not for the purpose of having a purchaser procured, and appellant did not intend to become the owner of such note, when by voluntary payment he wholly extinguished the obligation without a request from either of its makers. F. H. Hollister, cashier of the State Banking & Trust Company, had no authority to indorse the note after it was paid, or at all, and the bank that owned it cannot thus be made a seller without its knowledge or consent. Though paid by mistake, the debt was extinguished, and the note surrendered to appellant in its original form was no longer the subject of sale or transfer, and any subsequent indorsement by whomsoever made could not restore its previous characteristics as a writing obligatory. "The payment of a promissory note by a third person at the request of the maker to an agent holding it for collection extinguishes the note, and cannot afterwards be treated as a purchase. The obligation to pay being discharged, a subsequent transfer of the note by the payee to the person making the payment will not revive it." Moran v. Abbey, 63 Cal. 56. "Where, after a note has become due, a stranger calls upon the holder and pays the amount due upon it, declines having it canceled, and takes it away with him, nothing being said about buying it, this will be held a payment and satisfaction of the note, so as to prevent a suit being brought thereon by a person receiving it from the stranger." Burr v. Smith, 21 Barb. (N. Y.) 262. Nor does the right of subrogation exist in favor of a stranger who, without authority, pays the debt of a third person, and there is nothing in this record to justify departure from the foregoing decisions which announce the well-settled doctrine invoked by the courts in the following cases: McGee v. City of San Jose, 68 Cal. 91, 8 Pac. 641; Binford v. Adams, 104 Ind. 41, 3 N. E. 753; Neely v. Jones, 16 W. Va. 625, 37 Am. Rep. 794; Acer v. Hotchkiss, 97 N. Y. 395; Martin v. Quinn, 37 Cal. 55; Crumlish's Adm'r v. Central Improvement Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872; Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; 2 Dan. Neg. Ins., § 1223. The purchase of a promissory note requires the assent of authorized persons, and the transaction is a contract "by which, for a pecuniary consideration called a 'price'" the seller transfers his property to the buyer, while payment thereof is in no sense a contract, but essentially the performance of a promise by which such instrument is discharged and taken out of circulation. Therefore our conclusion must be that there is no privity of contract express or implied between respondent and appellant, and this action on the promissory note is not maintainable.

Whether as against any one the facts and circumstances under which he paid the note would justify the enforcement of any equities

Digitized by Google

in his favor is a question not in the case, and concerning which no opinion can be properly expressed.

As the point already determined is decisive of this appeal, the remaining assignments of error require no consideration.

The judgment appealed from is affirmed.

Decision No. 1096.

FIRST NAT. BANK OF WAPAKONETA v. BROTHERTON et al.

(Supreme Court of Ohio. April 14, 1908.)

84 N. E. 794.

MORTGAGES — INDORSEE OF NOTE — LIEN.

The transfer to a bona fide indorsee of a negotiable promissory note with a mortgage on real estate by which the note is secured confers upon such indorsee a lien upon the real estate free from all latent equities in favor of persons who are strangers to the title. Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385, distinguished.

(Syllabus by the Court.)

Error to Circuit Court, Allen County.

Action by one Brotherton, trustee in bankruptcy, and others, against the First National Bank of Wapakoneta. Judgment for plaintiffs was affirmed by the Circuit Court, and defendant bank brings error. Reversed, and judgment for plaintiff in error.

Suit was brought in the Court of Common Pleas by Brotherton, as trustee in bankruptcy of the estate of the South Side Lumber Company, to set aside a mortgage upon certain real estate described in his petition, upon the ground that it was fraudulent and void as to the creditors of the lumber company. The real estate which was subject to the mortgage had never been the property of the lumber company. It had been conveyed by one Raudabaugh to Roy J. Dewey, and the mortgage was executed by Dewey to one David C. Dunn to secure a promissory note of $6,000 of even date with the mortgage, and the note and mortgage were transferred and assigned by Dunn to the plaintiff in error, the First National Bank of Wapakoneta. In its answer and cross-petition in the case the bank alleged the facts necessary to constitute it a bona fide holder of the notes and mortgage. The cause was appealed to the Circuit Court, where it was tried and the rights of the parties determined upon an agreed statement of facts as follows:

"That the defendant the South Side Lumber Company is and was a corporation, organized under the laws of the State of Ohio with a capital stock of $20,000,000, and at all the times mentioned in the petition said capital stock was fully paid. That the said defendant David C. Dunn was at said times the owner of $6,700 worth of said capital stock, and that said Roy J. Dewey was the owner of $200

Digitized by Google

worth of said stock, and that on or about the 15th day of September, 1904, the said South Side Lumber Company was the owner of a large amount of lumber and other merchandise to the value of about $23,000. That at about said date the said corporation negotiated a sale of said lumber and merchandise to one Joshua R. Raudabaugh for about the price of $23,000. That the said D. C. Dunn was not favorable to said sale unless the said corporation would purchase from him $6,000 of his said capital stock at an agreed price of $6,000, and the balance of his said capital stock of $700 he transferred to W. W. Leighton for an agreed consideration as between themselves. That on the 8th day of September, 1904, the said negotiations for said sale and for the retirement of said stock having been in progress from on or about the said 8th day of September, 1904, the board of directors of said the South Side Lumber Company passed the following resolution or motion: 'That part of lot 1722 which is accepted from Joshua R. Raudabaugh as part payment for lumber stock at the valuation of $7,500 be deeded to R. J. Dewey as trustee, and that said Dewey be authorized to procure a loan on same of $6,000, which money is to be used to purchase and retire $6,000 of the capital stock of the said South Side Lumber Company now owned by D. C. Dunn.' That in pursuance of the aforesaid resolution, and as a part of the purchase price paid by said Raudabaugh to the said the South Side Lumber Company for said stock of lumber and merchandise, the said Raudabaugh did on or about the 31st day of August, 1904, and filed for record September 14, 1904, deed said premises to R. J. Dewey individually; there being no description or designation in said deed that said Dewey was in fact acting as trustee as provided in said resolution. That afterwards, to wit, on the 15th day of September, 1904, the said Dewey executed and delivered to said D. C. Dunn the note mentioned in the petition and set out and described in the answer and cross-petition and amended answer and cross-petition of the First National Bank of Wapakoneta, Ohio, and at the same time said Dewey individually executed and delivered to the said Dunn a mortgage on said property, being the property described in the petition, for the purpose of securing the payment of said note of $6,000, which mortgage was duly filed with the recorder of Allen county, Ohio, for record on said 15th day of September, 1904, at 1.20 o'clock P. M., and by him recorded in volume 83, p. 369, of the Records of Mortgages of said county, in which mortgage Emma Dewey, wife of said Roy J. Dewey, joined. And thereupon the said D. C. Dunn attempted to and did, so far as he had the power, cancel and surrender to said company $6,000 of the capital stock of said company so theretofore owned by him. That said Dunn, at the time of the transactions hereinbefore enumerated, was an officer of said company, was one of its board of directors, and was the acting secretary thereof, and that the said D. C. Dunn did then and there accept said note and mortgage in full payment and satisfaction of his said $6,000 of stock in said company thus surrendered and canceled by the company. That subsequent thereto, on the 10th day of November, 1904, proceedings were instituted in the United States District Court for the Northern District of Ohio, Western Division, by some of the creditors of said the South Side Lumber Company to have the said the South Side Lumber Company declared an invol-

Digitized by Google

untary bankrupt. That on the 2d day of December, 1904, the said the South Side Lumber Company was adjudicated a bankrupt in said proceedings. That on the 19th day of December, 1904, the plaintiff Cloyd J. Brotherton was elected trustee in bankruptcy for said bankrupt and immediately accepted the trust and qualified. That at the time of said adjudication in bankruptcy the said the South Side Lumber Company owed debts to the amount of $—. That, by reason of said proceedings, there passed to said Cloyd J. Brotherton, as such trustee, certain real estate of said bankrupt, also certain accounts then due said bankrupt, of the nominal value of $—. That such property so passing was all the property and assets, at that time or now, of said the South Side Lumber Company, except that the title to the property described in the petition was placed in the name of R. J. Dewey, who, in fact, was the trustee of the said the South Side Lumber Company, which was in fact the owner thereof, of which fact D. C. Dunn had full knowledge at the time of the execution of the mortgage, and this said property is the only other property in which the said bankrupt had or has any interest whatever, and which is or may become, by the adjudication of this court, assets in the hands of said trustee in bankruptcy. That the real estate so passing to the said trustee in bankruptcy was all incumbered by bona fide mortgage liens. That the trustee in bankruptcy has sold and disposed of all said real estate, except the real estate in controversy in this suit, under the orders of said bankruptcy court; and, after paying the said mortgage liens and the costs of said proceeding to sell the same, there remains in the hands of said trustee the sum of $—. That there have been filed and proven valid claims against said bankrupt which are unsecured, amounting to $—.

"It is further agreed that the unpaid and unsecured indebtedness of said the South Side Lumber Company, at the time the petition in this case was filed and now, is largely in excess of the assets of said the South Side Lumber Company; that the said company at the time of said adjudication in bankruptcy was insolvent and unable to pay its debts; and it is further agreed that the excess of liabilities of said the South Side Lumber Company over all assets now in the hands of said trustee or owned by said bankrupt, are largely in excess of the value of the property in litigation in this proceeding.

"It is further agreed that the said D. C. Dunn, shortly after the execution and delivery to him of said note and mortgage of $6,000, to wit, on the 23d day of September, 1904, borrowed of the First National Bank of Wapakoneta, Ohio, the sum of $6,000 and executed to said bank his own note for said sum; and at the same time, for the purpose of securing said loan to him, he transferred to said bank the said note and mortgage for $6,000 as collateral security by writing or indorsing on the margin of said mortgage the following words: 'For value received I hereby assign the within mortgage and transfer the note which is secured by same to the First National Bank of Wapakoneta, Ohio. D. C. Dunn'—and delivering said note and mortgage to said bank, and indorsing his name on the back of said note, which transfer was duly recorded on the margin of the record of said mortgage on November 29th, and that said bank, at the time it so received said note and mortgage, had no knowledge of any of the facts before recited, and no notice or knowledge of any

Digitized by Google

claim on the part of any one that said note and mortgage of $6,000 was other than the individual property of the said D. C. Dunn, or that the property upon which said mortgage was given was or had been other than the individual property of R. J. Dewey; that said note of D. C. Dunn, as collateral to which the said $6,000 note and mortgage were transferred to it, is past due and unpaid, and the said bank is still holding said $6,000 note and mortgage as collateral to said indebtedness.

"It is further agreed that Joshua R. Raudabaugh has paid the taxes and assessments as set forth in his answer and cross-petition, and that the same is the first and best lien upon said premises for the amount that he claims due him in said cross-petition, with interest as prayed for in said cross-petition. It is further agreed that the averments of the answer and cross-petition of Charles F. Ashton herein are true. It is further agreed that the above statement of facts shall be taken as the complete evidence in this case. It is further agreed that the existing and unpaid indebtedness against the South Side Lumber Company accrued prior to and existed before the 15th day of September, 1904."

Upon the facts thus agreed to the Circuit Court decreed the cancellation of the mortgage as against the bank, and ordered Dewey to execute a deed to convey the premises covered by the mortgage to Brotherton as trustee.

John W. Roby, for plaintiff in error. Frank E. Mead, Wheeler & Bently, and W. H. Leete, for defendants in error.

SHAUCK, C. J. (after stating the facts as above). The present case concedes that the relief sought by the trustee would have been properly granted but for the rights of the bona fide holder which attached to the interests of the plaintiff in error. This because of the fact that the mere surrender by Dunn of his stock in an insolvent corporation did not constitute a sufficient consideration to sustain either the deed to Dewey or his subsequent mortgage to Dunn. The question we have to determine is: May the invalidity of the mortgage be asserted against the bank which received it with the note which it secured, before due, for a full consideration contemporaneously advanced by it, and without either actual or constructive notice of the circumstances attending the execution of either the deed or the mortgage? The principal, if not the only, reliance of the Circuit Court for the affirmative answer which it gave to that question is Baily v. Smith, 14 Ohio St. 396, 84 Am. Dec. 385. Much care has been taken by this court, and by the courts of two other States which have followed Baily v. Smith, to limit its authority to the precise point which it decided. In any view which may be taken of the case, it is an obvious departure from the doctrine generally recognized by the courts of the country. This was clearly demonstrated in Carpenter v. Longan, 16 Wall. (U. S.) 275, 21 L. Ed. 313. Although the case, when reviewed in the later adjudications of this court, has been recognized as establishing a rule of property, care has always been taken to limit it to that conservative function. It has not been thought necessary or advisable to give such extended operation to its doctrine as would widen the divergence between the decisions of this court and those of other States and the federal

Digitized by Google

courts with reference to related subjects. Renewed attention to the precise conclusion there reached is necessary to the end that it may be distinguished from the conclusion which it is said to require in the present case. If the syllabus of that case is read in the light of the well-known rule of this court that it states the points decided, the relevant proposition of the syllabus, the fourth in number, will plainly suggest the needed limitation: "The transfer of a negotiable promissory note, secured by mortgage on real estate, to a bona fide indorsee, does not entitle the holder to foreclose the mortgage, when it appears that both note and mortgage were obtained by fraud." The point decided was that a note and mortgage to secure it having been obtained by fraud, the maker may interpose that defense against the mortgage in the hands of a bona fide indorsee, although he may not interpose it against the note. Obviously no other question could have been decided for no other was presented. In the present case the question is whether against such bona fide holder there may be asserted a latent equity in favor of persons who are not parties to the mortgage and as to whom the record contains no disclosure whatever. An affirmative answer to that question derives no support whatever from Baily v. Smith. Notwithstanding all that was there said, cases of this character are determined by the familiar rule that a mortgage is an incident to a negotiable note which it secures, and is subject to no equity which may not be asserted against the holder of the note. If it should be conceded that one in the position of the plaintiff in error might, consistently with the principles of law, be required to ascertain before purchasing whether the mortgagor has a defense against a suit to foreclose his equity of redemption, it would not follow that he should be held to inquire of mankind with respect to latent equities. In support of the view here suggested the cases are numerous and uniform. Types of them are Holmes v. Gardner, 50 Ohio St. 167, 33 N. E. 644, 20 L. R. A. 329; Railway Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 596; Humble v. Curtis, 160 Ill. 193, 43 N. E. 749.

Reference to the statement of facts in the present case shows that the plaintiff in error not only received the note by indorsement from Dunn, but that it received a formal assignment indorsed upon the mortgage, and that the same was duly entered of record. In view of this fact, counsel for plaintiff in error insists that the amendment of 1888 to section 4135, Rev. St. 1908, vested in the bank a legal title to the mortgagee's interest in the property, and that the point actually decided in Baily v. Smith is now inconsistent with the statute. It will be prudent to defer a decision of the question suggested until it shall receive from counsel and the court the more careful consideration which it is likely to receive in a case requiring it to be decided.

Without attaching any importance whatever to the amendment of the statute, it seems clear that the judgment of the Circuit Court was erroneous, and that upon the agreed statement of facts upon which the case was submitted the judgment should be in favor of the plaintiff in error.

Judgment reversed, and judgment for plaintiff in error.

PRICE, CREW, SUMMERS, SPEAR, and DAVIS, JJ., concur.

Digitized by Google

Decision No. 1097.

WESTERN LOAN & SAVINGS CO. v. THIBODEAU et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

159 Fed. 370.

REFORMATION OF INSTRUMENTS — MISTAKE — FRAUD — EVIDENCE.

1. Equity has jurisdiction to reform written instruments where there is a mutual mistake or mistake on one side and fraud or inequitable conduct on the other, but such relief will not be granted unless the evidence is so cogent as to thoroughly satisfy the mind of the court.

2. Evidence held to sustain findings that a note and mortgage had been fraudulently obtained for an excessive amount, and that complainants executed the instruments in good faith under an honest mistake without negligence, and were therefore entitled to reformation.

Appeal from the Circuit Court of the United States for the District of Montana.

James Ingebretseb and William H. King, for appellant. Hall & Patterson, for appellees.

Before GILBERT and ROSS, Circuit Judges, and De HABEN, District Judge.

ROSS, Circuit Judge. The appellees, Thomas H. Thibodeau, Sue R. Thibodeau, his wife, and Dennis Lee, brought this suit in the court below for the reformation of a certain promissory note, and mortgage given to secure the same, made to the appellant (defendant below), and for a decree to the effect that the note and mortgage as executed be canceled upon their paying the balance alleged to be due from them in accordance with the actual agreement of the parties.

The note as executed reads as follows:

"$11900.00 Missoula, Montana, December 9th, 1902.

"For value received we promise to pay to the Western Loan and Savings Company, a corporation of Salt Lake City, Utah, the sum of eleven thousand nine hundred dollars ($11900.00) in payments as follows: one hundred and forty dollars ($140.00) on the 16th day of each and every month, commencing with the month of December, 1902, until eighty-five (85) payments shall have been made. Payable at the Utah Commercial and Savings Bank, Salt Lake City, Utah."

"The jurisdiction of equity to reform written instruments where there is a mutual mistake, or mistake on one side, and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court." Simmons Creek Coal Company v. Doran, 142 U. S. 417, 435, 12 Sup. Ct. 239, 245, 35 L. Ed. 1063.

The court below had the advantage of observing the conduct and manner of testifying of the various witnesses, and was, as stated, in its opinion found in the record, entirely satisfied that the complainants had sustained their case; the findings of the court being to the effect

Digitized by Google

that the complainants applied to the defendant's agent for a loan of $7,000, payable in monthly instalments of $140 per month, with interest at the rate of ten per cent. per annum, out of which payments of $140 per month the interest accrued on the loan for the previous month should first be paid, and the balance applied to reduce the principal sum, the complainants to have the privilege of paying the debt in full at any time; that the agent agreed to make the loan upon those terms, and induced the complainants to execute the note above set out, and the mortgage securing the same, upon the belief of the complainants that the note and mortgage so executed by them expressed the terms upon which the complainants applied for, and the defendant's agent agreed to make, the said loan; "that defendant's agent knew, and purposely did not explain to Thibodeau or to any of the complainants, the difference between a loan of $7,000, payable at the rate of ten per cent. per annum, in monthly payments of $140 per month to be applied on interest and principal, and the contract as executed by the parties; that the defendant's agent, Brooks, knew Thomas H. Thibodeau well, and knew that he was illiterate, of French parentage and unfamiliar with the English language, and of complainants' reliance upon and confidence in said agent Brooks and his statements, yet he knowingly permitted Thibodeau and the other complainants to believe that the loan was such as Thibodeau and complainants requested — that is, in effect one for $7,000, with interest at ten per cent. per annum, payable in monthly instalments; that the defendant, for the purpose of misleading and deceiving complainants and preventing them from knowing the rate of interest provided for in said note and mortgage executed by complainants, did not express in said note or mortgage the rate of interest provided for therein, nor notify complainants or any of them that said note or mortgage provided for a rate of interest in excess of ten per cent. per annum, but to deceive complainants and to prevent them from knowing the actual rate of interest provided by said note and mortgage, caused the sum of $4,900 to be placed therein as interest, and represented to complainants that said $4,900 was ten per cent. interest per annum on $7,000, payable in instalments of $140 per month until paid, and that it amounted to the same thing whether complainants paid $7,000 with interest at the rate of ten per cent. per annum in monthly payments of $140 per month and applying the payments first to pay the interest for the previous month, and applying the balance to reduce the principal, as it would be to pay eleven thousand nine hundred dollars ($11,900) in eighty-five (85) monthly instalments of $140 per month; that said sum of $4,900, placed in said note and mortgage as interest, was far in excess of ten per cent. per annum, and was about nineteen and one-half per cent. per annum; that complainants would be required to pay as much interest on the last instalment, when all but one instalment had been paid, as they would be for the first month, when complainants had the full $7,000; that complainant Thomas H. Thibodeau, on behalf of complainants, had full charge of the negotiations for said loan, and communicated the negotiations concerning said loan to the other complainants; that said Thibodeau was illiterate; that he had made a previous loan from defendant through said agent on a different plan, which loan was settled to the satisfaction of Thibodeau; that defendant had gained the confidence of com-

Digitized by Google

plainants through said transaction and the previous relations of said Thibodeau with Brooks, and complainants relied upon the statements of said Brooks in executing the note and mortgage; that said Thibodeau was unable to figure the amount of interest that $7,000 upon interest at the rate of ten per cent. per annum, payable in monthly instalments of $140 each, would amount to, and complainants believed, relied, and acted upon the representation of Brooks that the sum of $4,900 placed in said note and mortgage, with the $7,000 loaned, was the correct amount which the $7,000 payable in monthly instalments of $140 per month at the rate of ten per cent. per annum interest would amount to. That complainants, desiring to pay off said loan in accordance with the terms they believed were contained in said note and mortgage in the month of December, 1905, requested from defendant the amount it would require to satisfy said note and mortgage, and, upon receipt of a statement from defendant of the amount claimed, complainants knew for the first time that defendant claimed a rate of interest on said loan in excess of ten per cent. per annum, and then for the first time knew that said note and mortgage failed to contain a provision giving complainants the privilege of paying the said loan in full at any time. That, upon said discovery, complainants notified defendant of the terms upon which it was agreed said note and mortgage should be given and said loan made, and requested defendant to reform said note and mortgage in accordance therewith, and complainant offered to return said $7,000, with interest thereon for the time complainants retained the same at the rate of ten per cent. per annum, but that said defendant refused to reform said note and mortgage in accordance with the complainants' understanding and agreement for said loan, or to accept the offer of complainants to return the loan, or to accept the offer of complainants to return the loan of $7,000 secured by complainants from defendant, with interest thereon at the rate of ten per cent. per annum, but defendant refused to modify or change or alter the conditions or terms of said note or mortgage in any respect, but elected to adopt and stand upon the provisions and terms of said note and mortgage as executed by complainants. That complainants would not have executed said note or mortgage or have accepted said loan had they known the rate of interest provided by said note and mortgage exceeded the rate of ten per cent. per annum on the sum held by them. That said loan was made and said note and mortgage executed and delivered, and all payments on said loan up to the time of trial were paid to defendant's said agent, Brooks, at Missoula, Mont., and were accepted by said defendant, and the provisions of said note and mortgage requiring payment to be made at Salt Lake City, Utah, were waived by defendant. That, at the time of negotiating and making of said loan and mortgage and executing said note and mortgage, complainants were and have at all times since been residents of the city of Missoula, State of Montana. That the note and mortgage signed by complainants did not express the thought and intent of the complainants, and that, by the intentional failure of the defendant's agent to explain to the complainants that the contract executed was different from that intended to be entered into, complainants were misled, and that defendant's agent intended to mislead them. That

Digitized by Google

the defendant's agent knew that the complainants believed the note and mortgage executed by them was for a loan of $7,000 as Thibodeau had applied for, and for such a loan as he, the agent, had said could be had, but which was not as the defendant expressed it in the papers signed. That complainants believed from the representation of defendant's agent that their contract with defendant's agent was equivalent to the terms in the note and mortgage signed. That if complainants had known that their contract for a loan was as literally expressed by the note and mortgage, they would not have signed them or accepted said loan. That complainants executed the instruments involved in good faith, under an honest mistake. There was no negligence on complainants' part. By the representations and actions of defendant's agent and defendant, calculated to mislead and deceive complainants, they never understood the terms or the effect of the note and mortgage signed by them, and their error was brought about by a misunderstanding of the papers signed by them."

Upon the evidence in the case we would not be justified in interfering with these findings made by the trial judge, and therefore must affirm the decree reforming the note and mortgage to conform with the actual agreement of the parties.

The decree is affirmed.

Digitized by Google

Digitized by Google

Decision No. 1098.

NATIONAL PARK BANK v. SAITTA.

(Supreme Court, Appellate Division, First Department. July 8, 1908.)

111 N. Y. Supp. 927.

APPEAL AND ERROR — REVIEW — HARMLESS ERROR — INSTRUCTIONS — QUESTIONS FOR JURY — WEIGHT OF EVIDENCE — BILLS AND NOTES — VALIDITY — CONSIDERATION — PRESUMPTIONS — ACCEPTANCE — REFUSAL — DISHONOR — ACTIONS — DEFENSES — LACK OF CONSIDERATION.

1. In an action against the acceptor of a bill of exchange, defendant alleged that the bill was presented to plaintiff for discount with bills of lading annexed for goods which were to be delivered to defendant upon acceptance, that plaintiff on the security of the bills of lading discounted the bill; that it was agreed between plaintiff and defendant that upon defendant's acceptance of the bill the bills of lading would be delivered to defendant; that the bill was accepted, and plaintiff then refused to deliver the bills of lading as agreed, so that there was no consideration for the acceptance. The court charged that if, when defendant "accepted," he demanded that plaintiff deliver to him the bill of lading accompanying the draft, and informed plaintiff that he was only accepting the draft on the understanding that the bill of lading would be delivered to him, and demanded that his acceptance be stricken from the draft unless the bills of lading should be delivered to him, and plaintiff refused to deliver the bills of lading, and refused to strike the acceptance from the draft, the jury might find that the writing of the word "Accepted" across the face of the draft, followed by defendant's signature, was not intended to be, and was not in fact, an acceptance of the draft, and might find for defendant. Held, that defendant could not complain of the charge, as it was more favorable than he was entitled to under his pleadings.

2. where questions upon which the evidence was conflicting were submitted to the jury in a charge favorable to defendant, a finding against him will not be disturbed on appeal, as contrary to the evidence or against the weight thereof.

3. Under Negotiable Instruments Law, Laws 1897, p. 727, c. 612, § 50, providing that every negotiable instrument is deemed prima facia to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value, the acceptor of a bill of exchange is presumed to have accepted it for a valuable consideration.

4. Negotiable Instruments Law, Laws 1897, p. 746, c. 612, § 221, providing that the holder of a bill presenting it for acceptance may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored, is not confined to sight bills, but seems to be applicable to all bills of exchange; and hence, if the agent of the holder of a bill of exchange presented the

Digitized by Google

bill to the drawee for acceptance, though the date of payment was fixed, and acceptance was refused, the holder could treat the bill as dishonored, and could immediately call on the other parties thereto.

5. Negotiable Instruments Law, Laws 1897, p. 750, c. 612, § 246, provides that a bill is dishonored by non-acceptance when it is duly presented for acceptance, and such an acceptance as is prescribed by the act is refused or cannot be obtained. Section 247 provides that where a bill is duly presented for acceptance, and is not accepted within the prescribed time, the person presenting it must treat it as dishonored for non-acceptance. or he loses his recourse against the drawer and indorsers. Section 248 provides that, when a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary. Held, that though, when a bill is made payable at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, it may be presented for acceptance at any time.

6. In a suit between remote parties to a bill of exchange, as the payee or indorsee and the acceptor, to sustain the defense of no consideration there must have been no consideration received by defendant for his liability, and plaintiff must have given no consideration for his title.

7. Where a person becomes a bona fide holder for value of a bill of exchange before its acceptance, his right to enforce it against a subsequent acceptor does not depend upon an additional consideration proceeding from him to the drawee, since the bill itself implies a representation by the drawer that the drawee will accept and pay according to the terms of the draft, and the drawee by accepting admits the truth of the representations, and, having obtained a suspension of the holder's remedies against the drawer and an extension of credit by his admission, he cannot controvert the fact.

Appeal from Trial Term.

Action by the National Park Bank against Philip S. Saitta as acceptor of a bill of exchange. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

See 55 Misc. 93, 106 N. Y. Supp. 328.

Argued before INGRAHAM, LAUGHLIN, CLARKE, HOUGHTON, and SCOTT, JJ.

Carl L. Thiele (Albert A. Wray, of counsel), for appellant.
Louis F. Doyle, for respondent.

CLARKE, J. The complaint alleges that on or about the 1st day of August, 1905, at the city of New York, one Mauro drew his draft or bill of exchange, directed to the defendant, at Genoa, Italy, and thereby required the defendant to pay to the order of said Mauro 13,750 lire 60 days after the date of said bill of exchange; that thereafter, on or about the 29th day of August, 1905, the defendant accepted the said bill of exchange; that thereafter, before maturity, the said Mauro duly indorsed and delivered the same, and before maturity the said draft came into the posession of said plaintiff for value, and the plaintiff still is the owner and holder thereof; that said bill of exchange was duly presented to the defendant, payment thereof was duly demended, but was refused, and no part has been paid. Wherefore plaintiff demands judgment for $2,581.25.

Digitized by Google

The answer alleges that on or before the 1st day of August, 1905, at the city of New York, one Mauro drew his certain bill of exchange in writing, dated on that day, directed to this defendant at Genoa, Italy, and thereby requested this defendant to pay to the order of Mauro the sum of 13,750 lire 60 days after date of said bill of exchange; that thereupon said bill of exchange was presented to the plaintiff for discount, and annexed to said bill of exchange were the documents or bills of lading for certain goods, wares, and merchandise, which were to be delivered to this defendant upon acceptance of said bill of exchange; that thereupon plaintiff took into its possession, and retained in its possession until the time hereinafter mentioned, the said bill of exchange, together with said bills of lading, and on the security of such delivery of such documents plaintiff discounted said bill of exchange and paid to said Mauro the sum of $2,641.06, which was equivalent to the amount of said draft, less interest, commissions, and charges of said plaintiff for discounting the same bill of exchange; that at said time it was agreed and understood between the plaintiff and this defendant that upon defendant's acceptance of said draft the plaintiff would deliver, or cause to be delivered, to defendant the bills of lading so delivered to the plaintiff at said time; that on or about the 22d day of August, 1905, this defendant did accept said bill of exchange and requested of the Banca Commerciale, the agent or representative of the plaintiff at Genoa, the bills of lading for said goods, wares, and merchandise; that after such acceptance of said bill said Banca Commerciale refused to deliver to this defendant said bills of lading; that the plaintiff, or its agents aforesaid, failed and refused to deliver to this defendant the documents or bills of lading for the goods, wares, and merchandise, in consideration for the delivery of which, which delivery was to be made at the time of acceptance of said bill of exchange, this defendant accepted said bill of exchange, and in consequence thereof there was an entire failure of consideration for the acceptance by this defendant of said bill of exchange, and no consideration ever passed to this defendant, either from said Mauro, the drawer of said bill of exchange, or from the plaintiff herein, who discounted said bill of exchange prior to its acceptance by this defendant as aforesaid.

It will be seen that by his pleading the defendant admits the making of the bill of exchange drawn upon him, its delivery to and discount by the plaintiff for value, its presentation to him before maturity, and acceptance by him, and that the defense set up is want of consideration flowing to him for that acceptance. The defendant attempted to establish that at the time of the discount of the bill the plaintiff agreed that the bills of lading attached should be delivered to him upon acceptance of the bill of exchange. Testimony controverting this was introduced by the plaintiff. This question was submitted to the jury, who found in favor of the plaintiff.

The defendant also attempted to establish that he had accepted the draft in reliance upon the promise that the bills of lading would be delivered upon such acceptance, and that at the time of acceptance he informed the plaintiff's agent that he was only accepting the draft on the understanding that the bills of lading would be delivered to him. This testimony was also controverted by testimony for the plaintiff.

Digitized by Google

Although the answer did not squarely present that defense, the court charged:

"That if you find that at the time the defendant wrote his acceptance across the face of the draft he demanded that the plaintiff's agent deliver to him the bill of lading accompanying the same, and that he informed the plaintiff's agent at such time that he was only accepting the draft on the understanding that such bill of lading would be delivered to him, and then and there demanded that his said acceptance be stricken from the said draft unless the said bill of lading should be delivered to him, and that the plaintiff and its agent refused to deliver the said bill of lading and refused to strike said acceptance from said draft, you may find that the writing of the word 'Accepted' across the face of said draft, followed by the signature of the defendant, was not intended to be, and was not in fact, an acceptance of said draft, and you may treat the same as if it had not been written by the defendant, and may find a verdict for the defendant."

This was a far more favorable charge than the defendant was entitled to upon his pleadings. The jury resolved this question in favor of the plaintiff. So that both of the foregoing questions, upon which the evidence was conflicting, were submitted to the jury in a charge favorable to the defendant, and, having been found against him by the jury, we cannot say that that finding was contrary to the evidence or against the weight thereof.

The final point to be considered is the defense of failure of consideration. The negotiable instruments law (chapter 612, p. 727, of the Laws of 1897) provides, in section 50:

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value."

When this defendant accepted this bill, he therefore was presumed to have accepted it for a valuable consideration.

Section 221 provides:

"That the holder of a bill, presenting the same for acceptance, may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored."

This provision is not confined to sight bills, but seems to be applicable to all bills of exchange. Consequently, if the bank in Genoa had presented the bill to the defendant for acceptance. Although the date of payment was fixed, and the drawee had refused to accept it, the plaintiff would have been entitled to treat the bill as dishonored, and would have acquired the immediate right to call on the other parties to the bill

Section 246 of the act provides:

"A bill is dishonored by nonacceptance when it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained."

Section 247:

"Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by nonacceptance or he loses the right of recourse against the drawer and indorsers."

Digitized by Google

Section 248:

"When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary."

"Although, when such a bill is made payable at a day certain at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection." Allen v. Suydam, 17 Wend. 368.

"A bill payable at a fixed period from its date may be presented for acceptance at any time." Bachellor v. Priest, 12 Pick. (Mass.) 399; Oxford Bank v. Davis, 4 Cush. (Mass.) 188.

It is settled that as between remote parties to a bill of exchange, as the payee or indorsee and the acceptor, in order to sustain the defense of no consideration, two considerations at least must come in question: First, that which the defendant received for his liability; and, secondly, that which the plaintiff gave for his title.

"An action between remote parties will not fail unless there be absence or failure of both of these considerations. It is immaterial when an acceptance is made. It may be made at any time, and the rights of payees and the indorsees are the same after it is made, whether they were acquired in anticipation of it or subsequent to it. Where, as in the case at bar, there is an acceptance upon the bill, it makes no difference in the rights of the payees or indorsees whether they became so before or after the acceptance. The instrument is negotiable before acceptance, and the acceptance is an acknowledgment of the debt it represents and absolute promise to pay it to the person who is or shall become the holder of the bill; and to allow a want of consideration for the acceptance to defeat the right of a bona fide holder, whether he became such before or after the acceptance, would be contrary to the nature and purpose of bills of exchange and to the uniform usage in regard to them." Arpin v. Ownes, 140 Mass. 144, 3 N. E. 25; Daniel on Negotiable Instruments (5th ed.) 174a.

In Heuertematte et al. v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657, the action was brought upon defendant's acceptance upon a bill of exchange drawn upon him at ninety days. Defendant offered to show that the accepance was made without consideration and was induced by fraudulent representations on the part of the drawer. This was objected to and excluded. Ruger, C. J., said:

"If a party becomes a bona fide holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. . . . By such acceptance the drawee admits the truth of the representation, and, having obtained a suspension of the holder's remedies against the drawer and an extension of credit

Digitized by Google

by his admission, is not afterward at liberty to controvert the fact as against a bona fide holder for value of the bill. The payment to the drawer of the purchase price furnishes a good consideration for the acceptance, which he then undertakes shall be made, and its subsequent performance by the drawee is only the fulfillment of the contract which the drawer represents he is authorized by the drawee to make. The rule that it is not competent for an acceptor to allege as a defense to an action on a bill that it was done without consideration or for accommodation, as against a bona fide holder for value of such paper, flows logically from the conclusive force given to his admission of funds and is elementary."

As it is conceded that the plaintiff was the bona fide holder for value of the bill in question, the foregoing statutory provisions and authorities conclusively establish that the defendant failed in his defense of want of consideration flowing to him for his acceptance.

As we have discovered no error in this record which requires interference with the judgment, the judgment and order appealed from should be affirmed, with costs to the respondent. All concur.

Decision No. 1099.

PENFIELD INV. CO. v. BRUCE.

(Kansas City Court of Appeals. Missouri. June 8, 1908. Rehearing Denied June 29, 1908.)

111 S. W. 888.

BILLS AND NOTES — BONA FIDE PURCHASER — BURDEN OF PROOF — QUESTION FOR JURY — EVIDENCE — CREDIBILITY OF WITNESSES — ACCEPTANCE OF TESTIMONY OF WITNESSES — CORPORATIONS — KNOWLEDGE OF OFFICERS — EFFECT.

1. Where defendant sued as the maker of a note transferred to plaintiff, showed that the note was procured by fraud, the burden shifted to plaintiff to show that he obtained it before maturity for a valuable consideration, and without notice of the fraud.

2. Where a transferee of a note was an innocent purchaser without notice of the fraud inducing the execution thereof held, under the evidence, for the jury.

3. The jury are not bound to accept the evidence of a witness as conclusive, especially where there is evidence impeaching the witness, and they are the sole judges of the credibility of his testimony.

4. Knowledge which comes to the managing officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation.

5. A note payable to a corporation was procured by fraud, and under an agreement that the note should not be assigned. The payee transferred the note to an individual who had knowledge of the agreement, and who transferred it to another corporation. The president of the assignee corporation was an officer of the payee corporation, and there was evidence that, as officer of the payee corporation, he learned of the facts before the transfer. Held, that the knowledge of the president of the assignee corporation was not notice to the corporation unless he acquired

Digitized by Google

such knowledge while acting as officer of such corporation and in the performance of his duties.

6. A note, for the price of goods bought at the time, was made payable to a corporation, as the result of negotiations carried on with a third person, who represented that he was an officer of the corporation. At the time of the execution of the note, the third person and the maker executed an agreement, stipulating that the note should not be transferred. The corporation transferred the note, and the transferee sued the maker. Held, that the agreement was properly received in evidence, though it was not shown that the third person was an officer of the corporation, for if he was not its agents, he had no authority to make the agreement, and the note would be invalid, and the transferee could not recover.

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by the Penfield Investment Company against Marshall C. Bruce. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Sidney S. Wilson and C. W. Meyer, for appellant. Allen, Gavvery & Mitchell, for respondent.

BROADDUS, P. J. This suit is to recover upon a promissory note in the sum of $750, executed by the defendant. The note is dated May 21, 1904, and was due in six months after date, and was made payable to the order of the National Separator Company, a corporation doing business at St. Joseph, Mo. Thereafter, on the 3d day of June, 1904, the said Separator Company executed and delivered to one Rice McDonald its promissory note for the sum of $1,500, due in four months from date. At the same time said Separator Company transferred to said McDonald, with other notes, the said note in suit, as collateral security for the payment of said $1,500. Thereafter, in the month of September, and before any of said notes had become due, the said McDonald transferred said two notes to the plaintiff, which is also a corporation. The defendant failed and refused to pay the note for $750, and plaintiff instituted this suit. The defense is that the note was obtained by fraud, and is without consideration. The testimony of defendant is to the effect that E. L. Worthman, who claimed to be the vice-president of the Separator Company, induced him to execute the note for the right to sell its separating machine in the county of Clinton, Mo. His machine purported, as its name signifies, the capacity for separating different seeds when mixed. There was evidence that, when the machine was tested on a quantity of mixed seeds in the office of the Separator Company, it worked successfully, as represented, but that it would not work successfully, and separate seeds, when mixed, found at other places. It was also shown that, at the time when the note was executed, the said Worthman, as vice-president of said Separator Company, executed a certain writing, which was also signed by the defendant, wherein it is recited that defendant had executed two notes of $375 each, and one note for $750, payable to said Separator Company, wherein it is agreed that all these notes shall be paid out of commissions received by defendant from said company, that the notes shall not be transferred to any other party, for any consider-

Digitized by Google

ation whatever, and that, if for any reason whatever the notes shall remain unpaid at the expiration of six months from date, they shall be null and void, and defendant shall not be liable for their payment. It was shown that A. H. Penfield was the president of the plaintiff, also a corporation, with its place of business in the city of St. Joseph; that while the negotiations were going on, and before the contract mentioned was signed, Mr. Worthman said: "Wait a minute, I had better see some of the other officers of the company, and see if this is satisfactory." That he stepped out, and brought in Penfield, and introduced him to defendant as the secretary of the company, and said: "Mr. Penfield, here is a contract that I have drawn up with Mr. Bruce regarding the payment of his notes." That he read over the contract to Penfield, and said: "Mr. Penfield, is that satisfactory to you?" That Penfield said, "It is perfectly satisfactory to me," and said to the defendant, "I don't think you ever will need your contract. I think you will make money out of the proposition." Penfield testified that he bought the note before due, without any knowledge that the notes were not to be transferred, and that he had no knowledge of any fraud in the transaction. He testified that he had no connection with the Separator Company at the time. McDonald knew, on the day of the execution of the note, of the contract referred to. Evidence was also introduced attacking the reputation of Penfield for veracity. The judgment was for the defendant, from which plaintiff appealed.

A number of instructions were given for each side of the controversy, to which no exceptions are taken, and which, in our opinion, in a general way presented the case to the jury correctly. Complaint is made by the plaintiff that the court erred in not instructing the jury, under the evidence, to return a verdict for plaintiff as requested, and in refusing to instruct the jury as asked in instruction designated as "B." It was as follows: "The jury are instructed that, even though you believe from the evidence that, at the time defendant executed and delivered the note in suit to the National Separator Company, false and fraudulent representations were made to him to induce to him to make such execution and delivery, and that said National Separator Company gave defendant a contract by which it agreed not to assign his said note, and that said note should be void if not paid out of commissions within six months from the date thereof, and though you further believe from the evidence that, at the time said note was so executed and delivered by defendant to said National Separator Company, A. H. Penfield was one of the officers thereof, and that at said time he was also president of the plaintiff, the Penfield Investment Company, and that he knew of the circumstances by which defendant was induced to execute and deliver said note, and knew of the contract given defendant by said National Separator Company, still such knowledge on the part of A. H. Penfield would not be knowledge thereof to the plaintiff, unless you also believe that said Penfield acquired such knowledge while acting as an officer of the Penfield Investment Company, and in the performance of his duties as such officer of the Penfield Investment Company." We approve of the action of the court in refusing plaintiff's peremptory request for a verdict. After the defendant had introduced his

Digitized by Google

evidence that the note was procured by fraud, the burden shifted to the plaintiff to show that he had obtained it, before due, for a valuable consideration, and without notice of such fraud. Hamilton v. Marks, 63 Mo. 167; Keim v. Vette, 167 Mo. 389, 67 S. W. 223; Bank v. Hammond, 104 Mo. App. 403, 79 S. W. 493. It was for the jury to say, upon the evidence, whether plaintiff had shown to their satisfaction that it was an innocent purchaser without notice of the fraud. The jury were not bound to accept the evidence of Penfield as conclusive of the question, as there was evidence tending to impeach his veracity, and they were the sole judges of the credibility of his testimony.

The case turns upon the question whether instruction B contained the law applicable to the facts to which it referred. In Kearney Bank v. Froman, 129 Mo. 437, 31 S. W. 769, 770, 50 Am. St. Rep. 456, it is said that: "The law is well settled in this State that knowledge which comes to an officer of a corporation through his private transactions, and beyond the range of his official duties, is not notice to the corporation." And that: "This is the rule, though the officer obtaining the knowledge was, at the time, the managing agent of the corporation." "When one is an officer of two corporations, and they have business transactions with each other, the knowledge of the common officer cannot be attributed to either corporation in a matter in which he did not represent it." Benton v. German American Nat. Bank, 122 Mo. 332, 26 S. W. 975. "Knowledge of the cashier of a bank, obtained by reason of his interest and connection with other parties, but not obtained in the performance of any duty he owed the bank, is not notice to the bank." Bank v. Fitze, 76 Mo. App. 356. "The knowledge of facts which is acquired by the officer of a corporation in the course of his private business, and not in his official capacity, does not constitute the knowledge of the corporation, and does not constitute notice to the corporation." Manhattan Brass Co. v. Webster G. & Q. Co., 37 Mo. App. 145. There are other decisions in this State which are in accord with the foregoing.

The respondent, however, calls our attention to decisions of other states, and to certain decisions in this State, that he claims will justify the action of the court in refusing said instruction. We will not notice those referred to of other states, as it would serve no useful purpose, but will limit our consideration to the cases decided by the courts of the State. In Carroll v. People's Railway, 14 Mo. App., loc. cit. 498, the court said: "But whether the president and directors had such knowledge or not, the corporation, nevertheless, had knowledge; for it is a rule of law that whatever a general agent of a corporation knows, when acting within the scope of his agency, touching the business of his agency, is the knowledge of the corporation." The decision is entirely in harmony with those already referred to. In Hayward v. Ins. Co., 52 Mo. 181, 14 Am. Rep. 400, the court held that notice to the agent of an insurance company, while his agency existed, of subsequent insurance on the same property, was notice to the company. The court said: "A corporation only acts through and by agents, and the proper and only way to give notice to a corporation is to notify an agent, and generally it is sufficient to notify an agent whose proper business is to attend to the matter in reference

Digitized by Google

to which the notice is given." It is not seen that this case has any application to the question under consideration, nor has that of George v. Railroad, 40 Mo. App., loc. cit. 445. In Chouteau v. Allen, 70 Mo., loc. cit. 341, Sherwood, J., in speaking of the knowledge of Webber, the agent of plaintiff, said: "Webber's agency being established, his knowledge acquired, not only during the continuance of his agency, but also that possessed by him so shortly prior to his employment, as necessary to give rise to the inference that it remained fixed in his memory when the employment began, must be deemed the knowledge of Chouteau." The language, which refers to the knowledge the agent possessed at the time of his employment, recently acquired, being imputed to the principal, might be construed as in conflict with the rule, otherwise stated, that knowledge acquired by the agent in his own private affairs, and not in his capacity as agent, is not to be imputed to the principal. But, however that may be, the doctrine is not the latest expression of our Supreme Court upon the question. In Stonecutter v. Myers, 64 Mo. App. 527, this court said: "The whole matter is this: W. B. Myers, as president and sole manager of the defendant stove company, purchased the machine from the individual, W. B. Myers, and at the time said officer acquired and had full knowledge that there was a balance due thereon. This knowledge bound the corporation for whom Myers was acting." The facts were that Myers was not only acting for himself, but at the same time he was acting for the corporation. In Savings Bank v. Thomas, 2 Mo. App. 367, it was held "that notice to a director of a bank of facts affecting the character of negotiable paper is notice to the bank." It was shown that the director of the bank was notified, before the note was discounted, of the character of the paper, and he was present at the board as director when the note was offered for discount and received by the bank. The case is somewhat different from that of Kearney Bank v. Froman, supra, where the knowledge was obtained while the director was not engaged in the business of the bank. We can see nothing inconsistent in the case from the general rule announced in all the cases, save and excepting that of Chouteau v. Allen, supra.

The plaintiff also complains of the action of the court in admitting said contract in evidence, as it was not shown that Worthman was vice-president of the National Separator Company. It was he who negotiated the entire transaction with defendant for a right to sell the separator in Clinton county. If he was not its agent, he had no authority to make the contract, and the note in suit would be invalid, and plaintiff would have no standing in court whatever; for if the authority for the one was wanting, there was no authority for the other. The transaction must be treated as a whole, and it must stand or fall together.

For the error of the court in refusing instruction B, the cause is reversed and remanded.

ELLISON, J., concurs. JOHNSON, J., not sitting.

Digitized by Google

Decision No. 1100.

COALING COAL & COKE CO. v. HOWARD et al.

(Supreme Court of Georgia. July 15, 1908.)

61 S. E. 987.

VENDOR AND PURCHASER — REMEDIES OF VENDOR — ACTION FOR PRICE — NATURE AND FORM — PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL — LIABILITY.

1. The action in this case is not upon the notes, but upon the original consideration for the purchase price of the property sold.

2. Where a corporation owning realty sells it through A., its president, to B., and notes for the purchase money are signed "B., Trustee," which are payable to "A., President," and the latter, in the name and behalf of the corporation, makes a deed to the property to "B., Trustee," who, without the knowledge of the corporation, makes the purchase for himself and others, and the possession, use, and benefit of the property goes to those for whom he thus purchases, held, the notes not being under seal, though negotiable, the corporation may maintain a suit outside of the notes on the original consideration for the purchase price against B. and the undisclosed principals for whom he acted in making the purchase.

Evans, P. J., and Lumpkin, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Coaling Coal & Coke Company against George P. Howard and others. Judgment for defendants, and plaintiff brings error. Reversed.

The plaintiff brought an action in Fulton Superior Court against R. E. Watson, George P. Howard, and others; the petition as amended alleging, in substance, as follows: On June 20, 1901, the plaintiff, a corporation, through its president, D. C. Lyle, sold to R. E. Watson, acting as agent and trustee for himself and the other defendants, certain described lands in Alabama, for a consideration of $20,000, and on the same date Lyle, president, in the name and behalf of the plaintiff, conveyed the property by warranty deed, in the usual form, to R. E. Watson, trustee. Watson took the deed in his own name as trustee by previous agreement between the defendants, receiving title as trustee for the use and benefit of all the defendants; and such title by operation of law inured to their benefit, and they became liable in law to pay the purchase price. Watson, acting as agent and trustee, paid $5,000, which was money of the defendants put in his hands, on the purchase price, and gave two promissory notes for $7,500 each, bearing interest at 7 per cent. per annum, and containing a covenant to pay 10 per cent. attorney's fees if not paid at maturity. The notes were signed by "R. E. Watson, Trustee," and payable to "D. C. Lyle, President." Lyle was the president of the plaintiff company, and the notes were payable to him in its behalf. At the time of making and signing the notes, the plaintiff did not know that Watson was acting as agent for the defendants, but the defendants were the undisclosed principals of Watson. The property

Digitized by Google

was purchased by the defendants through Watson as their agent, and they took and enjoyed it as their own. Neither the notes nor the purchase price of the property have been paid, and there is now due upon the contract by the defendants a named balance of principal and interest. The notes were signed in the name of Watson, trustee, by said Watson, by the agreement and authority of all of the defendants; and it was understood and agreed between them that the notes represented an indebtedness of all of them, and that they would all join in paying them. Copies of the notes (which were negotiable) were attached as an exhibit to the petition, were dated at Birmingham, Ala., and made payable at a bank in that city. On the hearing below the plaintiff tendered an amendment, alleging that before and at the time of the sale mentioned in the petition the property described therein belonged to the plaintiff; that the purchase price thereof was its right and property; that the $5,000 was paid to the plaintiff, and the balance of the purchase price was due and owing to it; that the notes were taken by its president for its account, were in its custody, and it was ready and able to surrender them to the defendants. This amendment the court refused to allow. The defendant George P. Howard interposed a demurrer to the petition, which the court below sustained on the general ground that no cause of action was stated against George P. Howard, and dismissed the petition as to him; to which action of the court, and to its order disallowing the amendment offered the plaintiff filed its exceptions.

Culberson & Johnson, for plaintiff in error. Smith, Hammond & Smith and Evins & Spence, for defendants in error.

HOLDEN, J. (after stating the facts as above). The first question to be determined in this case is whether or not this is a suit upon the notes, or a suit outside of the notes on the original consideration for the purchase price of the land. The notes provided for attorney's fees, and the original petition stated that the defendants were indebted to the plaintiff for attorney's fees. This allegation and some others in the original petition were stricken by the amendment allowed by the court, and it does not appear that any objections were offered to the allowance of this amendment, or that any exceptions were taken thereto. The petition will have to be construed just as if it had been originally filed in the exact language in which it appears after amendment, as an amendment relates back to the filing of a suit. The petition sets forth the details of the contract, and in doing so the deeds and notes are described and copies of the notes are attached to the petition; but it is alleged that a copy of the deed is not attached, because defendants have the deed and the plaintiff has no copy of it, but the petition nowhere states that the defendants are due the plaintiff anything upon the notes, and there is no prayer for a recovery upon the notes. The petition states that the defendants are liable to the plaintiff upon the said contract, and that neither the said Watson nor any one of the defendants has paid said notes, or the purchase price of said property, and that the defendants became and are liable in law to pay the purchase price. The petition sets forth an action for the purchase price of the property outside of the notes, and is not a suit on the notes.

Digitized by Google

2. None of the defendants except Watson are concerned with the surrender and cancellation of the notes. As they are negotiable notes, and as Watson is the only one who signed them, Watson is the only one who could be sued upon them. But, as to Watson, it would not be necessary to surrender them before the trial; it being sufficient for the plaintiff to have the notes at the trial for surrender and cancellation. Jackson v. Brown, 102 Ga. 87, 29 S. E. 149, 66 Am. St. Rep. 156; Belmont Farm v. Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312; 8 Cyc. 24. The plaintiff avers in the amendment which was disallowed that it has the notes, and is ready and able to surrender and cancel them. The plaintiff could maintain the suit in its name, as it alleged that it owned the property and its president, Lyle, acted for it in making the contract, and the purchase price under the contract is due to the plaintiff. Atlanta & W. P. R. Co. v. Texas Grate Co., 81 Ga. 602, 9 S. E. 600. According to the allegations of the petition, the plaintiff, a corporation, owned a tract of land in Alabama. Its president, acting for it, sold the land for $20,000 to R. E. Watson, acting for and in behalf of himself and the other defendants, who became the owners and obtained the possession, use, and benefit of the property under their purchase thus made. Five thousand dollars was paid to Lyle by Watson on the purchase price, which amount was furnished by the defendant for the purpose of being so paid. Notes were taken for the balance of the purchase money, signed by Watson, trustee, and payable to Lyle, president. These notes were dated at Birmingham, Ala., and payable at a bank in that city. A deed was made in Georgia, in the usual form, by Lyle, as president, to Watson, as trustee. Lyle was acting for and in behalf of the plaintiff in the transaction, and Watson was acting for and in behalf of himself and the other defendants, but it was not known to the plaintiff at the time of the transaction that Watson was acting as agent for and in behalf of the defendants. Can this suit on the original consideration outside of the notes for the purchase price of the property be maintained against the defendants? The word "president" after Lyle's name, and the word "trustee" after Watson's name, in the notes are merely descriptio personæ; and, there being nothing on the face of the papers to indicate who was to be charged as principal, these notes will have to be treated in the same manner as if such descriptive words were not used, and such notes will, prima facie, have to be considered as expressing an individual transaction between Lyle and Watson. The notes are negotiable instruments, and a suit could not be maintained on them against undisclosed principals. It was generally true, at common law, that a suit could be maintained against undisclosed principals on a written contract, but there were exceptions to this rule, among which were that undisclosed principals could not be held liable in a suit upon negotiable instruments, nor upon instruments under seal, and this is now the law as ruled by this and other courts and announced by many text writers. Lenny v. Finley, 118 Ga. 718, 45 S. E. 593; Van Dyke v. Van Dyke, 123 Ga. 686, 51 S. E. 582; Burkhalter v. Perry, 127 Ga. 438, 56 S. E. 631; 1 Clark & Skyles on Law of Agency, §§ 459, 464, 327; 1 Dan. Neg. Inst., § 303. This is also true where the words "as agent," or "as trustee," occur after the signature of the maker

Digitized by Google

of the negotiable instrument, without disclosing the name of the principal, or without sufficiently indicating on the face of the instrument who the principal is. 1 Clark & Skyles on Law of Agency, §§ 328, 275, 276; 2 Page on Contracts, § 761; Tiffany on Agency, p. 245. It is true, according to the weight of authority, that a suit cannot be maintained on the original consideration where at the time of the making of the contract the parties entered into a contract under seal, because the simple contract was merged into the higher contract under seal. This has also been held to be the law by decisions of this court in the cases of Lenny v. Finley and Van Dyke v. Van Dyke, cited supra. In the former case there was a lease contract under seal, and it was held that no suit could be maintained outside of the contract against an undisclosed principal for use and occupation. In the latter case it was held that a note under seal could not be disregarded and an undisclosed principal held liable for the money loaned. Suit can be maintained on the original transaction, outside of the written instruments, where the instrument is not under seal. 8 Cyc. 24 (note or bill taken); Burch v. Harrell, 93 Ga. 719, 20 S. E. 212; Tumlin v. Bass Furnace Co., 93 Ga. 594, 20 S. E. 44; Southern Printing Co. v. Felker, 125 Ga. 148, 54 S. E. 193; Wylly v. Collins, 9 Ga. 223; 2 Page on Contracts, § 789, pp. 1203–1205. Where a negotiable note is given, an undisclosed principal cannot be held liable on the note, but such undisclosed principal can be held liable in a suit on the original consideration or debt. 2 Page on Contracts, § 761, pp. 1149, 1150; Harper v. Tiffin Nat. Bank, 54 Ohio St. 425, 44 N. E. 97. The reason an undisclosed principal cannot be held liable in a suit upon a contract under seal or a negotiable instrument is, not because of the parol evidence rule, but because of the nature of these instruments. One simple contract does not merge or liquidate another simple contract. Wylly v. Collins, 9 Ga. 223. A negotiable note not under seal is a simple contract. If the defendants were really the undisclosed principals of Watson in buying the land, and no note had been given, there would be no doubt as to the right of the plaintiff to hold the undisclosed principals liable for the purchase price in a suit on account therefor. The taking of a simple contract in writing did not extinguish this right. The fact that the simple contract for the purchase money in writing was a negotiable promissory note cannot alter the principle. There is no suit on the notes. If the principals themselves had given the notes, this would not liquidate the unsettled account for the purchase price, and the principals would have had the right to sue on the original consideration and recover the purchase price. If taking the note of the principals themselves would not have destroyed the right of the plaintiff to sue upon the original consideration, how could the taking of the note of their agent or that of any other person have this effect? What has been said does not conflict with the principle that when a note, or bill of exchange, or other writing is taken for a debt from the party owing it, or their agents, or from any other person, and there is an understanding that it is accepted as payment, such understanding and agreement is binding on the party accepting such writing, and will be enforced by the courts.

In deciding this case we have had in mind the rule that the lex loci

Digitized by Google

controls as to the validity, form, force, and effect of a contract, in the absence of stipulations in the contract indicating a contrary intention of the parties, and that the lex fori governs as to the remedies by which it is enforced; and the further rule that, where no special statute of another State is pleaded, it will be presumed that the common law there prevails. The major portion of the amendment which the court refused to allow the plaintiff to make consisted of allegations which were substantially embodied in the petition as it stood upon the hearing. However, the statement in this amendment that the plaintiff had the custody of the notes and was ready and able to surrender and cancel them was a proper averment in view of the fact that Watson, who signed the notes, was one of the defendants against whom it was sought to recover upon the original consideration, and on this account the court should have allowed the amendment.

The court committed error in refusing the amendment, and in sustaining the demurrer of the defendant Howard, and dismissing the petition as to him; and its judgment is reversed. All the Justices concur, except EVANS, P. J., and LUMPKIN, J., dissenting.

LUMPKIN, J. (dissenting). The case before us presents an effort to change a suit on notes into a suit on a contract out of which the notes arose. This cannot be done either by one amendment or two Amending "on the installment plan" is no more proper for that purpose than a single sweeping amendment. See Morgan v. Pollard, 75 Ga. 358 (5); Head v. Marietta Guano Co., 124 Ga. 983, 53 S. E. 676 (5).

As originally brought, it can hardly be doubted that the suit was on the notes. It showed that Watson, "acting as agent and trustee" for defendants, bought land, paid some cash, and gave notes for the balance of the purchase money, bearing 7 per cent. interest, and he signing them as trustee; that at the time the plaintiff did not know that Watson was acting as agent for defendants, but has since discovered the undisclosed principals; and that there was due a specified amount as principal, interest, and attorney's fees, "upon the obligation before stated to pay 10 per cent. as attorney's fees in case of default in the payment of said notes." No other obligation to pay attorney's fees appears except that contained in the notes, and the claim thus set up was necessarily a suit on the notes. Wood v. Martin, 115 Ga. 147, 41 S. E. 490. Thus, then, the suit, as originally brought, was on the notes. By amendment, certain allegations were added and parts of the petition were stricken, including the claim for attorney's fees, but this did not change a suit on the notes into a suit on something else. At the time of the last hearing the petition as amended still contained the allegation that neither Watson nor any of the other defendants had paid said notes or the purchsae price of said property; and that "said notes were signed in the name of R. E. Watson, trustee, by said Watson by and with the agreement and authority of all of said defendants, and it was then and there understood and agreed between them [evidently meaning between defendants, as it was alleged that the plaintiff did not know that Watson was acting for them] that said notes represented indebtedness of all

Digitized by Google

of them, and that all would join in paying them." Copies of the notes were attached, showing that they were payable to order; and they contained no reference to any other person as debtor except Watson, but were signed "R. E. Watson, trustee." The amendment rejected alleged that the plaintiff stood ready to surrender the notes to defendants, and that the balance due on the purchase price of the land was due and owing to the plaintiff. This was an attempt to change the suit from one on the notes to one on the contract behind the notes, surrendering them. It was properly rejected. As suit on the notes, the action was demurrable. Where a negotiable promissory note contains no intimation of any other person as liable except the maker, a recovery cannot be had on a suit based on such note against another as an undisclosed principal. The mere addition of the word "agent" or "trustee" will not ordinarily be sufficient to change the rule. The exception stated in Burkhalter v. Brown, 127 Ga. 438, 56 S. E. 631, does not include this case, but it falls within the general rule there stated and supported by authorities. The allegations in regard to the original contract are rather in the nature of matter of inducement leading up to the effort to obtain judgment on the notes. This renders it unnecessary to discuss any question of liability on the original contract of purchase.

I am authorized to state that Presiding Justice EVANS concurs in the views herein set forth.

Decision No. 1101.

HUNTER v. BACON.

(Supreme Court, Appellate Division, First Department. July 8, 1908.)

111 N. Y. Supp. 820.

BILLS AND NOTES — BONA FIDE PURCHASER — BLANK NOTES — APPEAL AND ERROR — REVIEW — THEORY ADOPTED BELOW — PARTNERSHIP — ACCOMMODATION PAPER.

1. Under the law merchant and under Negotiable Instruments Law, Laws 1897, p. 719, c. 612, providing that one can be a holder in due course of a negotiable instrument only where it is complete and regular upon its face, a bank was not a bona fide holder of notes sent to it or the payee, and indorsed to it by the payee to meet overdrafts or to cover advances, where, when the bank's cashier received them, they were blank as to amount, date, and maturity; notice to the cashier being notice to the bank.

2. If, in an action on notes by a transferee after maturity, defendant's liability on notes fully filled out when received by the payee's indorsee is different from that on notes not filled out as to date, amount, and maturity, the Appellate Division will not treat them differently, where the case was tried on the theory that all the notes were governed by the same rule.

3. Even if notes given by a partnership were accommodation paper, because given outside the firm's business, a partner would be liable thereon if he authorized them to be given, or if he ratified the giving of them with knowledge of the facts, or omitted to stop their issue after knowledge.

Digitized by Google

Appeal from Trial Term, New York County.

Action by Wilson R. Hunter against Alexander S. Bacon. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed, and new trial ordered.

Argued before INGRAHAM, McLAUGHLIN, CLARKE, HOUGHTON, and SCOTT, JJ.

Alexander S. Bacon, in pro. per.
Louis Sturcke, for respondent.

HOUGHTON, J. In the opinion of this court on a former appeal (106 App. Div. 557, 94 N. Y. Supp. 880) the main facts involved are set forth, and it is now necessary to state only those material to the question of law arising on the present appeal.

The appellant, Bacon, and one Allen, composed the copartnership firm of I. N. E. Allen & Co., lumber commission merchants doing business in the city of New York. Bacon claims to have retired; Allen continuing the business alone, but under the copartnership name. By the dissolution agreement Allen assumed the liabilities and was to wind up the partnership affairs, but legal notice of Bacon's withdrawal was not given. Allen became interested in the North State Lumber Company, Limited, operating near Durham, N. C. It became the custom for the First National Bank of Durham to permit the lumber company to overdraw its bank account, and to draw on Allen & Co., in New York, to make good such overdrafts. Either to meet these overdrafts, or to furnish money to the lumber company, Allen sent to the bank or to the lumber company the notes in suit, payable to the order of the lumber company, signed, "I. N. E. Allen & Co." When the cashier of the bank received them, some of them were blank as to date, time of payment, and amount, and he, or some one under his direction, filled in these blanks as occasion required, and the lumber company indorsed them, and the bank placed the proceeds to the credit of the company. This was the general practice, and the precise situation as to the notes known as the August 4th notes.

It is claimed that authority to fill out these blanks came from Allen through the president of the lumber company, who was instructed to authorize the cashier to fill up the notes for as large an amount as the bank would take. The notes not having been paid, they were transferred to the plaintiff after their maturity. The plaintiff, amongst other claims, insists that the bank was a bona fide holder, and that therefore he is entitled to be so considered. The appellant, Bacon, contends that the bank was not a bona fide holder as matter of law, and that they were accommodation notes as to himself, given by Allen & Co. after his retirement from the firm, and that he cannot be held liable on them, because the giving of accommodation paper was not any part of the copartnership business. We think it is very clear that the bank was not a bona fide holder of the August 4th notes. When the cashier of the bank received them, they were not complete notes, and could only be made so by filling in the amount and date and time of payment. The cashier was engaged in the business of the bank in discounting them, and notice to him was notice to the bank itself. Gibson v. Nat. Park Bank, 98 N. Y. 87.

Digitized by Google

The notes purported to be made in New York State, and were payable there, and by the express provisions of the negotiable instruments law (Laws 1897, p. 719, c. 612) one can be a holder in due course of a negotiable instrument only where the instrument is "complete and regular upon its face." This statutory provision is but a codification of the rule of the law merchant, which was that a party buying commercial paper which remains in some essential particular incomplete and imperfect does not acquire the character of a bona fide holder. Davis Sewing Machine Co. v. Best, 105 N. Y. 59, 11 N. E. 146. The situation is not such as existed in Chemung Canal Bank v. Bradner, 44 N. Y. 680. In that case a draft containing blanks was in the possession of the holder, and it was held that authority on his part to fill them in could be assumed from his possession. The decision was based on the doctrine that, because apparent authority had been given, it would be a fraud upon innocent parties to permit an assertion to the contrary. Town of Solon v. Williamsburgh Savings Bank, 114 N. Y. 136, 21 N. E. 168. In the present case, as to the August 4th notes, the blank notes were sent to the bank and filled in by the bank officer. There was no reliance on possession as evidencing authority to complete the instrument.

On the former appeal this court in effect held that the bank was not a bona fide holder, and it is conceded that plaintiff, by his purchase after maturity, acquired no such right unless he obtained it through the bank itself. The trial court was requested by the appellant in various forms to hold and to charge the jury that neither the bank nor the plaintiff was a bona fide holder, and his refusal was error, for which the judgment must be reversed.

On the trial and on the argument on appeal the parties treated all the notes as practically within the same legal status. But if it be assumed that the August 22d notes are legally different, because they were received by the bank from the maker filled in, but not indorsed by the payee, whose indorsement was afterwards procured by the bank, still, in view of the charge of the court and the attitude of the parties in treating all the notes as governed by the same rule, we think we should not now be called upon to separate them and treat them differently. Some of the exceptions to the charge and requests which were refused relate to both classes of note. Viewing the exceptions as well taken at least as to some of the notes, we think we should treat the case as the parties have treated it, and hold that one rule on this appeal at least governs both kinds of notes.

On the former appeal, however, this court held that there was a question of fact as to whether the notes were as to Bacon in fact accommodation paper, or whether they were given in the course of the business of Allen & Co. Even if the notes were accommodation paper, because they were given outside the business of the firm, the appellant, Bacon, would be liable if he authorized them to be given, or if he ratified the giving of them with knowledge of the facts, or omitted to stop their issue after knowledge. Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547. The plaintiff claims that they were not accommodation notes given outside the business, but were given in the business of the firm of Allen & Co.: and he also insists there is evidence of knowledge or ratification, and

Digitized by Google

that in fact there was no dissolution of the firm. The appellant insists that there is no evidence sufficient to sustain a verdict upon any of these issues, and asks that the complaint be dismissed.

We think the plaintiff has a right to have a jury pass upon these questions. On a new trial, with the question as to either the bank or plaintiff being a bona fide holder eliminated, or the jury properly instructed asto the August 22d notes as the facts shall appear, the jury can intelligently pass upon the questions of fact, unembarrassed by that feature of the case.

The judgment and order should be reversed, and a new trial granted. with costs to appellant to abide the event. All concur.

Decision No. 1102.

CITIZENS' SAVINGS BANK OF COLUMBUS, OHIO, v. HALSTEAD et al.

(Appellate Court of Indiana, Division No. 1. June 9, 1908.)

84 N. E. 1098.

BILLS AND NOTES — MATERIAL ALTERATION — EFFECT — ALTERATION OF INSTRUMENTS — NATURE OF MATERIAL ALTERATION — EVIDENCE — SUFFICIENCY — APPEAL AND ERROR — VERDICT — CONCLUSIVENESS — GENERAL VERDICT.

1. The material alteration of a note renders it invalid in the hands of the original payee and in the hands of a bona fide holder.

2. The erasure of the name of one of the joint makers of a note after delivery and without the knowledge of the co-makers is a material alteration.

3. Where nine of the makers of a note alleged that it had been altered after delivery and without their knowledge by the erasure of the name of a third person who had signed as maker, and testified that it was agreed that the third person should sign as maker, that they each saw him sign, and the note, though not bearing the signature of the third person, showed an indorsement of a credit of a partial payment made by the third person, who testified that he did not sign as maker, it was for the jury to determine whether the note had been altered by the erasure of the name of the third person.

4. The court on appeal will not weigh the evidence to determine the correctness of the verdict on conflicting evidence.

5. Where the verdict for defendant is general, and the evidence supports a defense alleged in one paragraph of the answer, the failure to prove defenses set forth in other paragraphs is not ground for reversal.

Appeal from Circuit Court, Newton County; C. W. Hanley, Judge.

Action by the Citizens' Savings Bank of Columbus, Ohio, against Everett Halstead and others. From a judgment for defendants, plaintiff appeals. Affirmed.

William Cummings, S. H. Webb, and E. B. Sellers, for appellant. Frank Foltz and Charles G. Spitler, for appellees.

Digitized by Google

HADLEY, J. This is an action brought by appellant against appellees to recover on a joint and several promissory note payable to McLaughlin Bros., assignors of appellant, at a bank at Mt. Ayr, Ind., and executed by appellees. The complaint avers that said note was assigned to appellees for value before maturity. Appellees answered in six paragraphs: First, general denial; second and third, plea of non est factum; fourth, that the note was given for a stallion upon certain written warranties, that there was a breach of the warranties before the maturity of the note, that appellant was not the owner of the note, but only held it for collection for the payees. The fifth is substantially the same as the fourth. The sixth sets out the warranties that form a part of the consideration for the note and the breach thereof, and that appellant purchased the note with full knowledge of said defenses. Trial by jury and verdict and judgment for appellees. Appellant filed a motion for a new trial, which was overruled.

The only question presented for our consideration by the assignment of errors is upon the ruling of the court on appellant's motion for a new trial. And the only question properly presented for our consideration by the motion for new trial is that the evidence is insufficient to sustain the verdict. The plea of non est factum of appellees avers, in substance, that said note was signed by appellees and one B. B. Miller, and that his name was signed thereto when delivered; that after the delivery of said note, and without the knowledge or consent of appellees or either of them, the said name of B. B. Miller had ben erased, and did not appear upon the note sued on; that said Miller was a principal and jointly liable on said note, and by the erasure of his name said note was materially altered, and it was not therefore their note. That the material alteration of a note renders it invalid in the hands of a bona fide holder, as well as in the hands of the original payee, is well settled. Young et al v. Baker et al., 29 Ind. App. 130, 64 N. E. 54; Cronkhite v. Nebeker et al., 81 Ind. 319, 42 Am. Rep. 127; Dietz et al v. Harder et al., 72 Ind. 208; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; Webb v. Corbin, 78 Ind. 403; Hert v. Oehler, 80 Ind. 83 Erickson v. First Nat. Bank. 44 Neb. 622, 62 N. W. 1078, 28 L. R. A. 577, 48 Am. St. Rep. 753; Wiltfong v. Schafer, 121 Ind. 264, 23 N. E. 91. And the erasure of the name of one of the joint makers of a note after delivery and without the knowledge of the other makers is a material alteration. Gillett et al. v. Sweat, 6 Ill. 475; Nicholson v. Revell, 6 N. & M. 192; Coke's Litt. 232; Cheetham v. Ward, 1 Bos. & Pul. 630.

Appellant does not deny either of these propositions, but insists that the evidence does not show that said Miller signed the note. The nine other makers of the note testified positively that it was the agreement that he should sign the note, and that they each saw him sign his name to the same. Miller himself testified that he did not sign it. The note itself, as introduced, bears an indorsement showing a credit for $200 cash paid by said Miller. In this state of the record the fact to be determined is for the jury. It having passed upon the question, we will not weigh the evidence to determine the correctness of the jury's decision. Terre Haute, etc., Co. v. Kieley, 35 Ind. App. 180, 72 N. E. 658; Republic, etc., Co. v. Berkes, 162 Ind. 517, 70 N. E. 815.

Digitized by Google

It is also urged that the evidence does not support the averments of the fourth, fifth, and sixth paragraphs of answer. This contention may be true; but since the verdict is a general one and there is nothing to show upon what paragraph of answer the jury rendered their verdict, and since, as we have seen, the evidence is sufficient to support the second paragraph, the failure to prove the averments of the other paragraphs does not furnish grounds for reversal.

Judgment affirmed.

Decision No. 1103.

RICE v. BARRINGTON.

(Court of Errors and Appeals of New Jersey. June 15, 1908.)

70 A. R. 169.

BILLS AND NOTES — HOLDER FOR VALUE — BAD FAITH.

Bad faith, not merely notice of suspicious circumstances, must be brought home to the holder for value of a negotiable note whose rights accrued before maturity, in order to defeat his recovery upon the note on the ground of fraud in its inception.

(Syllabus by the Court.)

Error to Circuit Court, Burlington County.

Action by Herbert A. Rice against R. C. Barrington. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Wescott, for plaintiff in error. Fred A. Rex, for defendant in error.

GARRISON, J. This writ of error is brought to reverse a judgment entered upon a verdict directed for the plaintiff, Herbert A. Rice, in the court below. The defendant was R. C. Barrington, and the note upon which the action was brought read as follows:

"$380.14. Mount Holly, N. J., Nov. 9, 1905.

"Three months after date I promise to pay to the order of Roger Byrnes three hundred and eighty .14 dollars, at Mt. Holly, value received.

R. C. Barrington."

Indorsed:

"Roger Byrnes,

"Dr. H. A. Rice."

The plaintiff testified that he bought the note from its payee, Byrnes, before maturity, to wit, January 8, 1906. On cross-examination the plaintiff was asked: "Q. Well, you had purchased a note from Mr. Byrnes before this date, which you had found out from the party had been fraudulently obtained from him, had you not?"

This question was upon objection overruled. The overruling of this question is the first ground assigned for error. The ruling of the trial court was correct, and may be supported upon any of several grounds. The most comprehensive ground for sustaining the ruling is that the fact that Rice had found out that a note he had previously purchased from Byrnes had been fraudulently obtained was at most

Digitized by Google

a suspicious circumstance as regards the note in suit; and that the fifty-seventh section of the negotiable instrument act of 1902 (P. L. p. 593), read in connection with the decisions of our courts, establishes the rule that proof of circumstances calculated merely to arouse suspicion will not defeat recovery on a negotiable note taken for value before maturity. Bad faith — i. e., fraud, not merely suspicious circumstances — must be brought home to a holder for value whose rights accrued before maturity in order to defeat his recovery on a negotiable note upon the ground of fraud in its inception or between the parties to it. Hamilton v. Vought, 34 N. J. Law, 187; Read v. Abbott, 45 N. J. 303; Aldrich v. Peckham (N. J.), 68 Atl. 345, and the cases there cited.

The rule thus laid down covers the remaining assignments of error, also; for they all rest upon the assumption that notice of suspicious circumstances is the legal equivalent of proof of actual fraud.

This disposes of the assignments of error.

At the very close of the trial, counsel who then represented the defendant made a motion for the direction of a verdict for the defendant, upon the ground that the plaintiff had not proved his title to the note because he had not shown that the name of the payee that appeared to be indorsed on the note was the writing or signature of Roger Byrnes. The trial court denied this motion, and allowed an exception. In view of the decision of this court in Beckley v. Evans, 49 N. J. Law, 442, 9 Atl. 381, and the rulings upon evidence made in the pending trial, this motion, if well founded in the testimony, would be open to question. The denial of this motion, however, is not assigned as error. Indeed, the matter is not at all referred to in the brief of counsel for the plaintiff in error, which, on the contrary, speaks of "Rice being the regular indorsee of these notes from Byrnes." We have, therefore, not considered the matter, which is mentioned now merely to guard against the misapprehension that the course thus pursued at the trial is approved as to an indorsee whose ownership was not traced through proof of the indorsement of the payee of the note.

Finding no error upon any point that has been assigned, the judgment of the Circuit Court is affirmed.

Decision No. 1104.

RIECK v. DAIGLE.

(Supreme Court of North Dakota. June 19, 1908.)

117 N. W. 346.

BILLS AND NOTES — NON-NEGOTIABLE NOTE — DEFENSE — EVIDENCE — PAROL EVIDENCE — CONTRACT — ACTION — PAYMENT — APPEAL AND ERROR — REVERSAL — RENDITION OF JUDGMENT.

1. A promissory note, which contains the following stipulation: "This note subject to conditions of hotel purchase contract of even date herewith" — is non-negotiable, and hence an indorsee thereof takes the same subject to all legal

Digitized by Google

defenses or set-offs existing in favor of the maker of such note, at the date of the commencement of an action thereon.

2. A written contract supersedes all prior or contemperaneous oral agreements or negotiations relating to the subject-matter embraced therein.

3. Defendant pleaded payment in full prior to the commencement of the action, but such defense is not supported by any evidence. He also attempted to prove a set-off for damages, based upon a breach of the contract, subject to the conditions of which the note was given, but it is held, for reasons stated in the opinion, that such defense was not established.

4. Following the rule announced in Welch v. N. P. R. R. Co., 14 N. D. 19, 103 N. W. 396, held, that it is not a proper case for ordering judgment, notwithstanding the verdict, but a new trial is ordered.

(Syllabus by the Court.)

Appeal from District Court, Pierce County; Cowan, Judge.

Action by Henry Rieck against J. B. Daigle. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Christianson & Weber, for appellant.

FISK, J. This is an appeal from an order of the District Court of Pierce county denying plaintiff's motion for judgment notwithstanding the verdict, or for a new trial. The action was brought to recover upon a promissory note, executed and delivered by defendant to one Hulda Rieck, which note, it is alleged, was, before maturity and for value, sold and indorsed to plaintiff, the stepson of the payee of said note. The complaint is in the usual form, and the answer, after admitting the execution and delivery of the note as alleged in the complaint, pleads payment in full prior to the commencement of the action. The answer also denies that plaintiff purchased said note in due course of business, and alleges that he had full knowledge of all the facts concerning the consideration thereof at the time of his purchase. The answer then proceeds to set out the consideration for the giving of such note, and alleges that defendant purchased a hotel property from Hulda Rieck for the sum of $900, agreeing to pay her $600, and to assume the payment of $300, which she then owed to one Hyde from whom she had theretofore purchased the property. It also alleges that Hulda Rieck represented to him that the sum of $300 was the total amount owing by her to Hyde on her contract for the purchase of said property, and that such representations were falsely and fraudulently made, with knowledge thereof at the time they were made, and defendant alleges that there was at said time the sum of $400 due said Hyde from her on such contract, and that defendant had to pay, and did pay, said sum, with interest, to Hyde before he could get a deed for said property from her. It is also alleged that the note in suit is one of four notes, for $100 each, which defendant executed and delivered to Hulda Rieck as part purchase price for said property, and further that defendant has paid Hulda Rieck $500 and interest, and Hyde $400 and interest, being payment in full of the purchase price of said property.

At the trial the note in suit, after being properly identified, was introduced in evidence, and is as follows: "$100. Devils Lake, N.

Digitized by Google

Dak., Mar. 24, 1898. On or before the first day of December, 1902, for value received I promise to pay to Hulda Rieck or order one hundred ($100) dollars at the office of Albert M. Powell, Investment Banker, Devils Lake, N. Dak., with interest at the rate of seven per cent. per annum, payable annually, from date. This note subject to conditions of hotel purchase contract of even date herewith. J. B. Daigle." Said note bears an indorsement in blank by the payee. It was proven that, at the time this note was executed and delivered, there was a contract in writing, entered into between the parties, for the sale and purchase of this hotel property. This contract was offered in evidence, and, among other stipulations, contains the following: "Said Hulda A. Rieck and John Rieck, her husband, hereby agree to protect J. B. Daigle in quiet and peaceable possession of this hotel property, which has been sold to him, as against any possible harm or attempt at possession by Fannie M. Hyde, by reason of a disputed claim of $100, between said Fannie M. Hyde and Hulda Rieck." It is therefore apparent that the note is non-negotiable, and consequently is subject, in plaintiff's hands, to such defenses, when properly pleaded, as may exist. Plaintiff's contention that the same is negotiable is without merit, and the authorities cited by him are, we think, clearly distinguishable from the case at bar on the facts. Without attempting an analysis of the numerous authorities cited, which would serve no good purpose, we will proceed to a consideration of the other questions involved.

There are twenty-four alleged errors assigned in appellant's brief, but we are not required to notice them, except in a general way. The plea of payment was not supported by the proof, but the defense sought to be established was that, in the purchase of the hotel property, Hulda Rieck falsely represented that but $300 was at that time due Hyde from her, on the contract for deed to said property from Hyde to her, and that in fact there was a balance thus due of $400. Testimony was also introduced, over plaintiff's objection, tending to show an oral agreement, to the effect that if defendant was required to pay the $100 in dispute between Hyde and Hulda Rieck, the note in suit should be canceled and surrendered to him. We think this testimony was improperly received. Such oral agreement is clearly at variance with the written contract relating to the same subject-matter, entered into a day or two after such oral negotiations took place, and hence the written contract must be held to have superseded such oral negotiations. Proof of such oral agreement was therefore clearly incompetent. Under the clause of the written contract above quoted Hulda and John Rieck, her husband, agree to protect defendant in the quiet and peaceable possession of the property sold, as against any claims asserted by Hyde by reason of the disputed item of $100. If defendant can show a breach of such contract, then, no doubt, the damage resulting to him therefrom would constitute a proper set-off in his favor, as against the note in suit, but he wholly failed to establish such defense by any competent evidence. There is not a scintilla of evidence in the record tending to show that Hyde had any legal right to recover this disputed item of $100; and, in the absence of such proof, no right of set-off was shown, nor, for the same reason, was any defense shown under the oral agreement afore-

Digitized by Google

said, even conceding that such agreement was not merged in the subsequent written contract. The rulings of the trial court, as well as the instructions complained of, were therefore erroneous, and necessitate a new trial. Judgment non obstante is asked for, but this would not be proper, as upon a new trial defendant may be able to supply the defect in his proof. Welch v. N. P. R. R. Co., 14 N. D. 19, 103 N. W. 396.

The order appealed from, in so far as it denied plaintiff's motion for a new trial, is reversed, and the cause remanded for another trial. All concur.

Decision No. 1105.

JENNINGS v. LAW.

(Supreme Judicial Court of Massachusetts. Suffolk. May 22, 1908.)

85 N. E. 157.

EXCEPTIONS, BILL OF — CONSTRUCTION — BILLS AND NOTES — CONSIDERATION — STATUTORY PROVISIONS — RELEASE OF INDORSER OF FORGED INSTRUMENT — "VALUE."

1. Although it is not expressly stated in the bill of exceptions that it contains all the evidence offered at the trial, yet, where both parties in their briefs have assumed this to be the case, the appellate court will deal with the cause upon that basis.

2. Under Rev. Laws, c. 73, § 41, providing that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon is deemed a party thereto for value, and section 42, providing that "value" is any consideration sufficient to support a simple contract, and that an antecedent or pre-existing debt constitutes value, and section 43, providing that, where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time, where defendant signed the note in suit and gave it to O. to enable him to take up a forged note indorsed to plaintiff by O., plaintiff could recover against defendant, for O. was liable as indorser of the forged note, whether he knew it was forged or not, and plaintiff had a right to accept defendant's note in settlement of O.'s liability.

Exceptions from Superior Court, Suffolk County.

Action by Stephen Jennings against George H. Law as maker of a note. Judgment for defendant, and plaintiff excepts. Exceptions sustained.

W. C. Cogswell, for plaintiff. F. G. Holcombe, for defendant.

SHELDON, J. Although it is not expressly stated in the bill of exceptions that it contains all the evidence offered at the trial, yet as both parties in their briefs have assumed this to be the case, we have dealt with the case upon that basis. Johnson v. Kimball, 172 Mass. 398, 52 N. E. 386; Ready v. Pinkham, 181 Mass. 353, 63 N. E. 887.

The substance of the evidence was that the plaintiff had taken from

Digitized by Google

one Owen and held another note upon which Owen was indorser, and as such owed to the plaintiff the sum of $400; that Owen was then indicted for having uttered that note, knowing it to have been forged. Under these circumstances the defendant signed the note in suit and gave it to Owen, "to help him out," as he testified, expecting Owen to repay him any sum that he might be required to pay. Owen took this new note to the plaintiff, indorsed it, and delivered it to the plaintiff in settlement of the first note. Owen testified that the plaintiff then delivered the first note to him, and he destroyed it. The plaintiff offered evidence that Owen merely took from him an order on the district attorney for the first note after the district attorney should have finished with using it in evidence. There was no evidence whether this first note actually had been forged or not; but there was evidence that at the trial of the criminal case Owen testified that he had no knowledge that it was forged, that he had acted in good faith, and that he "had given the plaintiff a good note [the note in suit] for the forged note."

There was no dispute that the defendant had signed this note for the accommodation of Owen, and that Owen had indorsed it to the plaintiff for value, to settle the first note. Owen was liable on this first note to the plaintiff as indorser thereon; and this liability was the same whether the note was or was not originally a forgery, and whether or not Owen had uttered it knowing it to be a forgery. Under these circumstances, the plaintiff was prima facie entitled to recover upon the note in suit against the defendant, its maker. Rev. Laws, c. 73, § 41 et seq.

The defendant has not argued against any of the propositions that have been stated, but rests his defense solely upon the contention that the plaintiff had agreed, if Owen would get the defendant to give the note sued on, to accept the same, and to quash the criminal case pending against Owen, and that it was for this purpose that the defendant made the note, and so that the transaction was forbidden as an agreement for the compounding of a felony. He says in his brief: "The transaction was one forbidden by law, and the evidence coming to the court from the plaintiff, the court had a right to receive it and instruct the jury to find for the defendant if they believed it." Cardoze v. Swift, 113 Mass. 250, and cases there cited.

But the difficulty with this contention is that we find no evidence to support it. There was no evidence of any agreement of the plaintiff to quash the criminal case, or of any other unlawful agreement by him. He had a good claim against Owen on the note, and had a perfect right to settle it. Indeed, it appears incidentally that Owen was afterwards tried on the criminal charge, though it does not appear whether he was convicted or acquitted. If, as we infer from the argument of the defendant, this was the only ground upon which he rested his defense, we are of opinion that the plaintiff's exceptions must be sustained.

So ordered.

Digitized by Google

Decision No. 1106.

VOGEL v. STARR.

(Kansas City Court of Appeals. Missouri. June 29, 1908.)

112 S. W. 27.

BILLS AND NOTES — SUFFICIENCY OF NOTICE OF DISHONOR — DILIGENCE — QUESTIONS OF LAW OR FACT — PERSONAL SERVICE — NOTICE OF DISHONOR — SUFFICIENCY.

1. The owner of a note who had placed it with another for collection, assuming that it was his duty to communicate to his agent the knowledge of facts material to the subject of the employment he had or might acquire during the course of the employment, was not charged with the further duty either to himself notify the indorser of dishonor of the note, or to make inquiries as to where the indorser received his mail.

2. Whether a notary exercised reasonable diligence in giving notice of dishonor to an indorser is a question of law, not of fact, where there is no controversy over material facts.

3. Personal service on an indorser of notice of dishonor is not required, but constructive service will suffice where reasonable diligence is exercised to make it in the manner best adapted to convey actual notice.

4. Where a notary made inquiries of several persons as to the post-office address of an indorser, all of whom appeared to possess some information on the subject and expressed the belief that a certain town was the proper address of the indorser, and that town was the nearest town to the indorser's farm, and was a much larger town than the town at which the indorser in fact received his mail, and the notary acted in good faith, a notice of dishonor sent to such town was sufficient, though because the indorser did not receive his mail there, but in such other town, it was not received within a reasonable time.

Appeal from Circuit Court, Grundy County; G. W. Wannamaker, Judge.

Action by John Vogel against O. J. Starr. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

P. C. Stepp, W. D. Stepp, and O. N. Gibson, for appellant. A. G. Knight and W. G. Collison, for respondent.

JOHNSON, J. Action against the indorser of a negotiable promissory note. The failure of the holder to give proper notice of dishonor is the defense interposed. Trial was before the court without the aid of a jury. Judgment was entered for defnedant, and plaintiff appealed.

The note in question is as follows: "$45. Trenton, Mo., Oct. 7, 1895. One year after date, I promise to pay to the order of O. J. Starr, forty-five dollars, for value received with interest at the rate of eight per cent. per annum from date, until paid, and if not paid annually, the same to become a part of the principal and bear the same rate of interest as the principal debt. Payable at the First National Bank, Trenton, Mo. C. Millard." A few days after the execution of the note, and long before its maturity, Starr, the payee,

Digitized by Google

sold it to plaintiff for value, and indorsed it in blank. Later plaintiff deposited it with the Trenton National Bank for collection. On the last day of grace, October 10, 1896, and within proper hours, the bank handed the note to a notary public for demand and protest. Millard, the maker, had moved to Wisconsin, and Starr, the indorser, lived in the country about twelve miles from Trenton. The notary testified: "Well, it was done on the date that appears on the protest and on the face of the note, which is the 10th day of October, 1896. This note was given to me to protest by the Trenton National Bank of Trenton, Mo. I didn't know at that time the indorser on the back, Mr. Starr, or I didn't know C. Millard, and don't know him now. The bank told me to protest the note, and they gave me information as to where Millard lived; and, according to that information, I mailed the notice of protest to him at Hanover, Rock county, Wis., and my impression is that in regard to Mr. Starr's address the bank's best information; that is, they told me they were not certain about it. That's the way I remember it; that it was Spickards, Mo. And I took the note. It was payable at the First National Bank, Trenton, Mo., and I took this note to the building that had been occupied by the First National Bank. The First National Bank at that time had gone into liquidation in connection with the old Grundy County National Bank. It had its first banking room at the five corners; and the First National and the old Grundy County National Bank consolidated and liquidated through the Trenton National Bank. . . . This protest shows that I took it to that building and presented it there, and found no one there to pay the note. And after that, out of an abundance of precaution, I went over to the Citizens' State Bank, which was diagonally across the street from the building formerly occupied by the First National, and I presented the note there, to the cashier of that bank, as the protest shows, and demanded payment there. I think Walter P. Fulkerson was cashier at that time, and there was nobody there that would pay the note; so from there I went to the Trenton National, or might be probable I made the demand there before I went to the other place, at any rate, I presented the note as the protest shows to the cashier of the Trenton National Bank, Mr. R. M. Cook, and demanded payment of the note. R. M. Cook had already been the cashier of the First National Bank at which this note was payable, and he was winding up the affairs of the old First National at the time, and also cashier of the Trenton National. Then I made inquiry as to where Mr. Starr lived, and made a diligent search, as I thought. . . . They thought Mr. Starr lived near or got his mail at Spickards, Mo., and so I made some other inquiries as to where Starr lived, at the banks, Mr. Cook and the Citizens' Bank also, and I wouldn't say positively as to who else I did inquire of. . . . I mailed the notice to Starr at Spickards, Mo. Q. Your information was that that was his post office? A. From information I got from inquiring of Cook and Fulkerson and the clerks in each bank, and I wouldn't say positive but I was in Knight & Harber's office at the time and Dale Stepp took my affidavit to the notice; and my impression is I made inquiry among them as to where Mr. Starr lived, but I may be wrong about that. I wouldn't state positively; and I mailed the notice. I have stated in a general way

Digitized by Google

what had been done; that is, in regard to protesting of this note. And it was signed and sealed by me and I put that in an envelope and mailed it to Mr. Starr at Spickards, Mo. Put a two-cent stamp on it and put it in the post office; in the same way to Millard, except his was addressed to Hanover, Rock county, Wis." Starr did not receive the notice until some three months after it was mailed, for the reason that Tindall, and not Spickards, was his post office. The farm he occupied as a tenant was about one mile nearer Spickards than Tindall, either by wagon road or as the crow flies, and Spickards, though a small town, was much larger than Tindall. But Starr had made the latter place his post-office address while living on a farm nearer to it than to Spickards, and continued to get his mail there. No doubt is suggested in the evidence of the good faith of the notary and of plaintiff's collection agent in mailing the notice to Starr's nearest post office, nor do we find anything indicative of bad faith on the part of plaintiff, the owner of the note. He was not in Trenton on the date of the protest, nor had he imparted to his collection agent the information he possessed respecting Starr's post-office address. Had he done this, we perceive nothing in the facts known to him to support the conclusion that his collection agent and the notary might have acted differently. The farm where plaintiff lived was, perhaps, two miles from that occupied by Starr. While the note was maturing, they met occasionally and casually on the public road, at Tindall, or at a neighborhood church, but plaintiff did not know that Starr received his mail at Tindall, and it appears that he and Starr were acquainted only slightly.

While it is true that the holder of commercial paper for collection must be regarded as a separate and independent holder for the purposes of presentment, demand, protest, and notice of dishonor (Renshaw v. Triplett, 23 Mo. 213; Griffith v. Assmann, 48 Mo. 66; Ivory v. Bank, 360, 475, 88 Am. Dec. 150; Bank v. Briedow, 31 Mo. 523; Young v. Hudson, 99 Mo. 102, 12 S. E. 632), we are willing to concede for argument that it was the duty of plaintiff to communicate to his collection agent the facts in his knowledge relating to the post-office address of the indorser, but we do not sanction the contention that he was charged by law with the further duty of either to notify the indorser personally of the dishonor of the note or to make inquiries in the neighborhood to ascertain the place where the indorser received his mail. The note, by its terms, being payable at Trenton, it was very natural that plaintiff should employ an agent at that place to look after its collection, and that he should rely on his agent to take the necessary steps to hold the indorser. We are going far enough when we assume that it was his duty to communicate to his agent the knowledge of facts material to the subject of the employment he had or might acquire during the course of the employment. It was not his duty to perform personally the very duties he had delegated to his agent. When a person employs an agent to do a thing, he should not be held to be remiss for relying on his agent and only may be held liable for the negligent or wrongful acts of the agent in the performance of the delegated duty under the principle that what one does by the hand of another he does himself. Imputing to the collection agent and the notary knowledge of the facts known to

Digitized by Google

plaintiff, our chief concern is with the question of whether the notary exercised reasonable diligence in the giving of notice to the indorser. Since we find in the record no controversy over material facts, the question is one of law, not of fact. As early as the case of Linville v. Welch, 29 Mo. 203, it was decided by the Supreme Court that what is due diligence in giving notice of dishonor of a bill of exchange is a question of law when the facts are undisputed, and, when they are in dispute, the court should give hypothetical instructions, leaving the facts to be determined by the jury. Sanderson's Adm'r v. Reinstadler, 31 Mo. 483; Fugitt v. Nixon, 44 Mo. 295.

Considering the case, then, from the standpoint presented by the facts known to plaintiff, knowledge of which we ascribe to the notary, and by the facts acquired by the notary from his own inquiries, and treating the question of due diligence as a question of law, we next turn to consider the principles and rules by which the holder of a bill of exchange must be controlled in giving to an indorser notice of dishonor. The liability of the indorser is conditioned upon the existence of two facts, viz.: (1) That the maker has made default in the payment of the bill at maturity; (2) that due notice of that fact be given the indorser. As to what will constitute sufficient notice, it is well settled that personal service of the notice is not required, Constructive service will suffice if reasonable diligence be exercised to make it in the manner best adapted to convey actual notice. "Where the party to be served is a resident of the city or town where the protest is made, the course required is to give him personal notice or to leave it at his dwelling or place of business. But, if he lives in the country, then a notice by mail to his post office will be sufficient." Barrett v. Evans, 28 Mo. 331; Sanderson's Adm'r v. Reinstadler, supra. When the indorser lives in the country and his post-office address is not known to the holder, it is the duty of the latter to make reasonable inquiries in the town or city where the bill is payable, and, in default of more specific information, to address the notice to the post office nearest the residence of the indorser. But the holder is not justified, in all cases, in sending the notice to the nearest post office. He must act in good faith always and with reasonable diligence to learn the place where the indorser receives his mail, and, learning it, must send the notice there, regardless of whether it be the nearest post office. With these principles before us, we do not hesitate to declare as a matter of law that the notary, whose good faith is not questioned, exercised reasonable diligence and acted on the information he recived in a way which would have commended itself to any reasonably careful and prudent person in his situation. He made inquiries of several persons, all of whom appared to possess some information on the subject and all expressed the belief that Spickards was the proper address of the indorser. Taking these opinions, in connection with the facts that Spickards was the nearest town to the indorser's farm and was a much larger place than Tindall, we think any person in the situation of the notary would have come to the conclusion, as he did, that the notice should be sent there. Finding, as we do, that the notary acted properly, it is immaterial that the indorser failed to receive the notice within a reasonable time. That was his misfortune for which, in a sense, he was responsible.

Digitized by Google

He was justified in standing strictly on his right to legal notice, but presumably he knew of the fact of the maturing of the note, and from all the circumstances must have anticipated that notice of dishonor likely would be addressed to him at Spickards. The notice was sufficient.

The case was not tried in accordance with the views expressed, and it follows that the judgment must be reversed and the cause remanded. All concur.

Decision No. 1107.

KRAMER et al. v. GRANT.

(Supreme Court, Appellate Term. June 30, 1908.)

111 N. Y. Supp. 709.

APPEAL AND ERROR — RECORD — CONTENTS — ATTORNEY AND CLIENT — RETAINER AND AUTHORITY — COLLECTION OF MONEY — REVIEW — RIGHT TO ALLEGE ERROR — ESTOPPEL — PAYMENT — RECEIPT OF CHECK — EFFECT OF NEGOTIATION — BILLS AND NOTES — CHECKS — PRESENTMENT FOR PAYMENT.

1. A rubber stamp indorsement and pencil marks erasing the same, on the back of a check introduced in evidence in the court below, cannot be considered on appeal, where there is no evidence in the record explanatory of the indorsement and its cancellation.

2. A debtor is justified in paying the amount of the debt to one purporting to act as attorney for the client, where the creditor, on being communicated with by the debtor, informed the debtor that the matter was in the hands of the creditor's attorney.

3. Where the plaintiff, by objecting to the introduction of evidence offered by defendant, prevented defendant from proving the authority of one who purported to act as plaintiff's attorney, he cannot urge on appeal that defendant failed to prove such authority.

4. Though the giving of a check in satisfaction of a debt is no more than a provisional payment, such a payment becomes absolute where the authorized agent of the creditor indorsed the creditor's name on the check and negotiated the same to third persons.

5. Delay in the presentment of a check will relieve the drawer from liability, where he has been injured by the delay.

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Harry Kramer and another against Floyd Grant. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

Argued before GILDERSLEEVE, P. J., and MacLEAN and SEABURY, JJ.

George H. Mallory, for appellant. Charles Dushkind, for respondents.

Digitized by Google

SEABURY, J. This action was brought to recover for goods sold and delivered. The defendant pleads payment. The defendant communicated with the plaintiff as to the debt, and was informed that the plaintiff had placed the matter in the hands of its attorney. On January 27, 1907, the defendant mailed a check for the amount of the debt to the plaintiff's attorney. This check was received at 9:30 A. M. on January 28, 1907, by a clerk in the office of the plaintiff's attorney. The check was drawn upon the Mechanics' & Traders' Bank, and was made payable to the order of the plaintiffs. The clerk, on receiving the check, indorsed the plaintiffs' name upon it, and also his own name, and delivered it to the attorney for the plaintiffs. The attorney indorsed it, and transferred it to Louis N. Feldman, who also indorsed it. Feldman, so far as the record shows, is a stranger to the transaction. What Feldman did with the check does not appear. On January 30, 1908, the Mechanics' & Traders' Bank closed its doors, and at the time of the trial of this action the check was in the possession of the attorney for the plaintiffs. On the back of the check there is a rubber stamp mark, which is as follows:

"Received payment through New York Clearing House, Jan. 29, 1908. Mechanics' Bank, Seventy-Sixth Ward Branch, Brooklyn, N. Y."

Upon this indorsement there are several blue pencil marks, apparently put there for the purpose of erasing the indorsement. There is no evidence in the record explanatory of the rubber stamp indorsement or of the blue pencil marks. In the absence of any evidence upon the subject, neither the rubber stamp mark nor the blue pencil marks can be considered upon the determination of this appeal.

Although the court erroneously excluded evidence which the defendant offered to show that the plaintiffs' attorney had authority to accept the check, we think that such authority may be implied from the other facts that were proved. When the defendant communicated with the plaintiffs, he was told that the matter was in the hands of their attorney, and this reference to the attorney held him out as having power to act for the plaintiffs. Walsh v. Hartford Fire Ins. Co., 73 N. Y. 10. In view, also, of the fact that the objections of the counsel for the plaintiffs prevented the defendant from proving that the attorney had power to receive the check, the plaintiffs on this appeal cannot be heard to assert that their attorney was without this power. So far as this appeal is concerned, therefore, the plaintiffs' attorney must be regarded as the agent of the plaintiffs, and as acting within the scope of his authority in accepting the check.

As between the plaintiffs and the defendant, the loss resulting from the failure of the bank should fall upon the former. Their agent received the check, and at that time and until the bank closed its doors the account of the defendant in the bank was ample to meet the check. The agent of the plaintiffs did not deliver the check to his principals or deposit it at once for collection. On the contrary, it is evident from the indorsements upon the check that the agent negotiated it. The check, when originally delivered, was merely a provisional payment of the amount due; but when the authorized agent of the plaintiffs indorsed the plaintiffs' name upon it, and their attorney in turn indorsed and delivered it to some one other than the plaintiffs, that

Digitized by Google

which was given as provisional payment became absolute, and the defendant was relieved of further obligation. It is well settled that delay in the presentment of a check will relieve the drawer from liability, where he has been injured by the delay. 7 Cyc. 977; Murphy v. Levy, 23 Misc. Rep. 147, 50 N. Y. Supp. 682; Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43. In appropriating and negotiating the check, instead of depositing it for collection within twenty-four hours after it was received, the plaintiffs' agent acted at the risk of his principals, rather than at the risk of the drawer of the check.

Judgment appealed from is reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

Decision No. 1108.

TRUST COMPANY OF AMERICA v. HAMILTON BANK OF NEW YORK CITY.

(Supreme Court, Appellate Division, First Department. July 8, 1908.)

112 N. Y. Supp. 84.

PAYMENTS — MISTAKE OF FACT — RECOVERY — BILLS AND NOTES — PAYMENT OF FORGED BILL OF EXCHANGE — BANKS AND BANKING — FORGED CHECKS — PAYMENT — RIGHTS OF BANKS — RECOVERY OF PAYMENTS — "FICITITIOUS" — FORGED CHECK — LIABILITY TO DEPOSITORS.

1. The general rule is that payments made under a mistake of fact, though negligently made, may be recovered.

2. A drawee of a bill of exchange, to which the drawer's name has been forged, who accepts or pays the same, can neither repudiate the acceptance nor recover the money paid; he being bound to know the drawer's signature.

3. Where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one who holds under such forged indorsement may be recovered.

4. Negotiable Instruments Law, Laws 1897, p. 724, c. 612, § 28, provides that an instrument is payable to bearer when it is payable to the order of a fictitious person and such fact was known to the person making it so payable. The name of the maker of checks purporting to have been signed by an administrator, made payable to beneficiaries entitled to a greater amount from the estate than the amount of the checks, was forged. The checks were accepted and paid by the drawee. The names of the payees were also forged. It did not appear who forged the maker's name, but the person who did so knew that the payees would never have any interest in the instruments. Held, that the payees were fictitious within the statute, and the drawee could not recover the money paid.

5. Where a party forging a check was a stranger to the drawee and the person receiving the money on the check, and they were equally innocent, the drawee must stand the loss, for the risk of paying out money on a forged signature of a depositor is one a banker must assume.

Submission of controversy under Code Civ. Proc., § 1279, by the Trust Company of America and the Hamilton Bank of New York City. Judgment for defendant.

Digitized by Google

Argued before INGRAHAM, CLARKE, SCOTT, McLAUGHLIN, and HOUGHTON, JJ.

Albert B. Boardman, for plaintiff. Herman Aaron, for defendant.

McLAUGHLIN, J. This is a controversy submitted to the court upon an agreed statement of facts under section 1279 of the Code of Civil Procedure. The controversy relates to four checks for $500 each, drawn upon the plaintiff, a trust company doing a banking business, and signed: "Estate of Kate M. Wallace. Arthur B. Wallace. Adm'r." At the time the checks were presented to the plaintiff for payment, the estate of Kate M. Wallace was one of its depositors, having to its credit an amount in excess of all the checks, which could be drawn out on checks signed by Arthur B. Wallace, administrator, when countersigned by the United States Fidelity & Guaranty Company. The Wallace estate had then been practically settled, and the amount on deposit was ready for distribution among the next of kin of the decedent. The four checks in question were drawn without the knowledge or authority of the administrator, his signature being forged, and in each there was inserted as payee the name of some one of the next of kin whose distributable share of the amount on deposit with the plaintiff was greater than the amount of the check or checks thus apparently payable to such person. The first check was dated September 25, 1905, and was presented on that day to the United States Fidelity & Guaranty Company by a person unnamed, without the knowledge of plaintiff or defendant. The United States Fidelity & Guaranty Company, relying upon the apparent genuineness of the check, countersigned the same, and it was then, by some person unknown, presented to the plaintiff for acceptance and by it accepted, in writing. The name of the payee was then forged upon the back of the check as first indorser, and it was subsequently deposited with the defendant, by one M. F. Kerby, one of its depositors, who was given credit for the same. It then bore the following additional indorsements: "Harvey J. Conkey. M. F. Kerby. A. Edward Fisher." Thereafter, the defendant, through the New York Clearing House, presented the check to the plaintiff for payment, guaranteeing the indorsements, and it, relying upon the genuineness of the check, with the guarantee of the defendant thereon, not knowing that the indorsement of the payee was forged, paid the same in good faith. Substantially the same facts are true in regard to the second check, which was dated in November, 1905. The other two checks, dated in December, 1905, and January, 1906, were not presented to plaintiff for acceptance before payment and were deposited with defendant by Harvey J. Conkey, one of its depositors, to the credit of his account; otherwise, the same course was pursued with regard to them. They were indorsed "Harvey J. Conkey" below the forged indorsement of the payee.

Upon discovering the forgeries, the plaintiff at once notified the defendant, tendered back the checks, and demanded repayment. In the meantime both Kerby and Conkey had withdrawn the proceeds of the checks, and the defendant, relying on plaintiff's acceptance and payment of them, had paid out the same in good faith. The defendant has refused to repay plaintiff the amount of the checks, or any of

Digitized by Google

them, and the question presented is whether plaintiff is entitled thereto.

The general rule is that payments made under a mistake of fact may be recovered, although negligently made; but it is also settled that, if the drawee of a bill of exchange to which the drawer's name has been forged accepts or pays the same, he can neither repudiate the acceptance nor recover the money paid, since he is bound to know the drawer's signature. Price v. Neal, 3 Burrows, 1354; Bank of United States v. Bank of Georgia, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; National Park Bank v. Ninth National Bank, 46 N. Y. 77; Goddard v. The Merchants' Bank, 4 N. Y. 147. It is also settled that, where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one who holds under such forged indorsements may be recovered. Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615; Canal Bank v. Bank of Albany, 1 Hill, 287.

Therefore, if all the indorsements on the checks in question had been genuine, the plaintiff could not recover; but if the maker's signatures had been genuine, and only the indorsements or any of them forged, it could recover. Having paid the checks, the plaintiff cannot now be heard to say that the maker's signatures are not genuine, or recover on the ground that the same were forged, and by rason of that fact it is suggested that the rights of the parties are precisely the same as though the drawer's signatures were genuine, and since the defendant never obtained good title to them, on account of the forged indorsements of the payees, the plaintiff is entitled to recover. There are authorities to support this contention. First Nat. Bank v. Northwestern Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247; McCall v. Croning, 3 La. Ann. 409, 48 Am. Dec. 454. But it does not necessarily follow, because the checks were not indorsed by the persons whose names appeared on thm as payees, that the defendant, which received them in good faith and paid value therefor, can be compelled to repay their amounts to the plaintiff.

A leading authority on the subject is Bank of England v. Vagliano Bros., L. R. 1891 App. Cas. 107, which reversed Vagliano v. Bank of England, 23 Q. B. D. 243, and 22 Q. B. D. 103. This authority has been frequently cited and is directly in point. There, Vagliano Bros. were foreign bankers doing a large business in various parts of the world. One of their clerks, Glyka, forged a large number of bills of exchange purporting to be drawn on the firm by one of its foreign correspondents, payable to another well-known firm. He also forged letters of advice to accompany them and caused them to be presented, the same as genuine bills, to Vagliano Bros. in the regular course of business. Vagliano Bros., deceived by the cleverness of the forgeries, accepted from time to time bills aggregating over $350,000, which they directed the Bank of England, their general banker, to pay when presented. After bills had been accepted, Glyka would obtain possession of them, indorse thereon the name of the payee, and collect the money from the bank, which charged the amounts so paid to the account of Vagliano Bros. The latter, on discovering the forgeries, sued the bank to recover the amounts so paid out on the forged bills. The House of Lords held, reversing the decisions of the lower courts,

Digitized by Google

that this amount could not be recovered. The decision is placed upon the ground that "since Glyka, although he inserted in the forged bills as payee the name of a well-known firm, knew that such firm had no interest in the bills and never intended that it should, the payee was fictitious," and under the statue providing that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer" (Bills of Exchange Act 1882, § 7, subsec. 3), the bills of exchange were, in legal effect, payable to bearer, and the bank obtained good title, regardless of the indorsements.

Some doubt was expressed in the Bank of England Case as to whether the statute warranted such construction, since the effect was to make the fictitiousness of the payee depend upon the maker's intention; but under our own statute no such question can be raised. The Negotiable Instrument Law provides (Laws 1897, p. 724, c. 612, § 28):

"The instrument is payable to bearer: . . . (3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable."

The correctness of the decision in First National Bank v. Northwestern Bank, supra, may well be questioned, since the decision of the lower court, which was reversed by the House of Lords, in the Bank of England Case, was cited at length and relied upon. Whether this be so or not, the decisions in our own State are entirely in harmony with the views expressed by the House of Lords. Thus, in Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310, a partner drew a bill of exchange in the name of the partnership, payable to one Truman Billings and forged thereon the indorsement of the latter. The bill subsequently came into the hands of the defendant bank, and the plaintiff, upon whom it was drawn, accepted and paid it. It was held that the plaintiff, on discovering the forgery, could not recover the amount paid from the defendant, since the bill was in effect payable to bearer, and defendant had good title. Mr. Justice Bronson, who delivered the opinion of the court, distinguished the case of Canal Bank v. Bank of Albany, supra, and said:

"As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. . . . In legal effect, though not in form, the bill is payable to bearer. . . . The plaintiff probably accepted and paid the bill under the mistaken assumption that the indorsement was genuine; but he was not mistaken about the main fact which he was concerned to know, which was that the holder was the owner of the bill."

And in Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, the cashier of the National Bank of Sumter, S. C., drew checks in the name of the bank, inserting as payees the names of customers of the bank, whose indorsements he forged. The checks thus drawn were sent to various firms in New York and subsequently came into the hands of the defendant, which received them in good faith and charged them to the account of the Sumter Bank. The receiver of the Sumter Bank there-

Digitized by Google

after brought an action to recover the amount of these checks, and it was held that the same could not be maintained, since in legal effect the payees were fictitious and the checks payable to bearer, and for that reason the defendant obtained good title. The court, Mr. Justice Gray delivering the opinion, said:

"The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys, by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter Bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. . . . The fictitiousness of the maker's diretcion to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name."

Under the negotiable instruments law and the cases cited, I am of the opinion the checks in question, as between plaintiff and defendant, were payable to bearer. It does not appear who forged the maker's signatures, but the subsequent history of the checks does not leave it open to doubt that the person who did so knew that the parties whose names were used as payees would never have any interest in the instruments. Just as in the Bank of England and the Phillips Cases, in order to accomplish the fraud more easily, the names inserted as payees were those of persons to whom checks might naturally be made. Whether indorsing the names of the payees upon the checks was technically forgery or not it is unnecessary to consider. It has been convenient to thus describe them. Despite these forged indorsements, then, the defendant acquired good title, since in legal effect the checks were payable to bearer. Plaintiff, having paid them to a holder in due course, cannot recover upon the ground that the payees' signatures were forged.

Nor is this view at all in conflict with Shipman v. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821. There, the plaintiffs' firm signed a large number of checks relying on the false statements of an employee; the names of the payees being in some instances fictitious and in others the names of existing persons. The employee upon whose false statements the checks were made then indorsed upon them the names of the respective payees, and the checks were thereafter paid in good faith by the bank upon which they were drawn. The court held that the plaintiffs could recover from the bank the amount paid, distinguishing the Bank of England Case, and the distinction is obvious. In the former case, the member of the firm who signed the checks in the firm name believed that in every instance the payee was a real person to whom alone the check was payable, while, in the latter case, the person who wrote the maker's signature was a forger who knew that, so far as the bills of exchange were concerned, the payee was fictitious. The court expressly recognized the rule that the maker's intention was controlling, saying:

Digitized by Google

"The maker's intention is the controlling consideration which determines the character of such paper."

It is true that in many of the authorities cited the person guilty of the fraud was connected in some way with one of the parties, which may have affected the equities of the case, as was suggested in Shipman v. Bank of State of New York, supra, concerning the decision in the Bank of England Case, while here, so far as appears, the guilty party was a stranger to both plaintiff and defendant, and they are equally innocent. But that cannot change the law as to the fictitiousness of the payees, and, if it did, I am of the opinion that any equities in the present case are with the defendant. The risk of paying out money upon a forged signature of a depositor is one which a banker must assume, and, if the plaintiff had detected the forgeries when the checks were presented for payment, it would not have suffered any loss, and it is possible that the defendant would not.

I am of the opinion that the plaintiff has no legal claim against the defendant, and for that reason the latter is entitled to judgment upon the merits, with costs. All concur.

Decision No 1109.

FIRST STATE BANK OF SCOTT CITY v. VOGELI.

(Supreme Court of Kansas. June 6, 1908.)

96 Pac. 490.

BANKS AND BANKING — ACTIONS FOR PAYMENT OF FORGED CHECKS — FAILURE TO FIND ON MATERIAL ISSUES — PAYMENT OF CHECKS — NEGLIGENCE.

1. In an action by a depositor against a bank to recover the amount of a check which it was alleged was forged, the jury returned a verdict for the plaintiff, and a special finding that they were unable to agree whether the signature to the check was written by the plaintiff. Held, that it was error to refuse to set aside the verdict and to render judgment thereon.

2. It is not negligence for a bank to pay a check written on the blank of another bank without making inquiry.

3. Neither any rule of law nor the ordinary course of business renders it a matter of suspicion that the body of a check is not written in the handwriting of the maker.

4. None of the facts found by the jury were sufficient to constitute negligence on the part of the bank.

(Syllabus by the Court.)

Error from District Court, Scott County; Charles E. Lobdell, Judge.

Action by B. Vogeli against the First State Bank of Scott City. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

The plaintiff, B. Vogeli, brought this action against the bank to recover the proceeds of a check for $1,800, the signature to which he

Digitized by Google

claims was forged. The facts briefly stated are as follows: On May 4, 1904, plaintiff had on deposit in defendant bank the sum of about $4,000. At that time he informed the cashier of the bank that he was going to Illinois and Missouri on a visit, and requested drafts or a letter of credit so that he might get his checks cashed anywhere, and was given a letter of credit good for the amount of $400. The petition alleges that the check which the bank paid was not drawn on a form of its bank, but on a blank of the American National Bank of Kansas City, Mo.; that the plaintiff never signed the check, and that defendant carelessly, negligently, and without any authority from him cashed the check without making any inquiry of the plaintiff as to its genuineness, and if the defendant bank had exercised due diligence, and had made inquiry, it could have ascertained before paying it that the same was forged and fraudulent. The petition alleges that the plaintiff returned to Scott City on the 15th day of September, 1904, had his bank book balanced and his checks returned, and immediately notified the bank that the check in controversy was fraudulent and forged, and demanded of the bank repayment of the amount.

There was a conflict in the evidence as to the genuineness of the signature to the check, expert testimony bing offered on both sides. The plaintiff was asked if the signature to the check was his, and answered as follows: "Don't look like my signature; I never signed my signature to no check." In his testimony he admitted that while in Sedalia, Mo., he met a stranger who offered to send him some seed wheat if he would sign his name in a book; that he wrote his name in what appeared to be a blank book with a fountain pen which the stranger handed to him, and that he signed it while standing in the street; that he did not have his glasses on at the time though he generally used glasses when he wrote; that he had no place on which to rest his arm at the time of writing; that in the conversation he had informed the stranger that he lived in Scott City and had sold his farm. The officers of the bank and others testified that after he returned home he admitted in different conversations that his signature to the check was genuine, but that he had no intention of signing a check when he wrote his name. On September 19th he signed a statement for the bank to this effect. On October 28th he signed another statement as follows: "Scott City, Kansas, Oct. 28, 1904. Relative to the check in favor of J. O. Montgomery on the First State Bank of Scott City, Kansas, given August 15, 1904, and indorsed by J. O. Montgomery and others is fraudulent except my signature, which is genuine, but the said signature was obtained by fraud by the said J. O. Montgomery or J. O. Logan as he represented himself to be at the time of obtaining the signature. B. Vogeli."

The plaintiff denied that he knew the contents of these papers when he signed them, but this was contradicted by several witnesses. One of the officers of the bank went to Kansas City at different times for the purpose of attempting to recover the money. He was accompanied by the plaintiff on one of these trips, and the bank officers testified that the foregoing papers were signed by the plaintiff in order to be used in recovering the money. The plaintiff had been a depositor of the bank for a number of years. He was 67 years of age, rather illiterate, and frequently had the cashier of the bank write his checks for him which he would sign. The jury returned a verdict for

Digitized by Google

the plaintiff for the amount of the check, upon which the court rendered judgment. In addition to the general verdict the jury returned the following findings: "(1) Was the signature to the check in controversy written by the plaintiff? Answer: Can't agree. (2) Was the defendant guilty of negligence in paying said check? Answer: Yes. (3) If you answer that the defendant was guilty of negligence, state what the negligence consists of? Answer: In paying a check that was written on a blank of another bank without making inquiry, and for an amount in excess of letter of credit, and after having paid the check written by Vogeli on a bank check of defendant bank for $100 and seeing that the check sued on was not filled up by Vogeli. (4) Was the plaintiff guilty of negligence in signing his name to some blank paper or partly filled out paper in the hands of a stranger? Answer: Yes."

The bank brings these proceedings in error.

F. L. Martin and J. S. Simmons, for plaintiff in error. W. B. Washington and Peters & Peters, for defendant in error.

PORTER, J. (After stating the facts as above). The instructions properly told the jury that the burden was upon the plaintiff to prove that that the signature was not genuine, and that he must do so by a preponderance of the evidence. On this very material issue the jury were unable to agree, but for some reason which is not apparent the court refused to set aside the verdict, and rendered judgment. This was error. If the signature was genuine the bank was obliged to pay unless there was something in the appearance of the check to excite suspicion, or there was some fact known to the bank sufficient to put it upon inquiry. True, the jury found that the bank was guilty of negligence in paying the check, but they also found in what the negligence consisted, and no one of the things or all of them combined would constitute negligence. It is not negligence for a bank to pay a depositor's check written on the form of another bank. There is no invariable rule by which customers of a bank are required to use a blank check prepared by the bank, and in the ordinary course of business it is of very common occurrence to use a check of another bank, erase the name and insert that of the bank in which the depositor's account is kept. This occurs every day in all banks.

Nor did the fact that the check was for an amount in excess of the $400 letter of credit tend to prove negligence or put the bank upon inquiry. The letter was given the plaintiff to establish credit with other banks or persons with whom he might have business. His account was subject to check, and he needed no letter of credit to oblige the bank to pay checks drawn by himself. Again, the fact that some days previously the bank had paid a check for $100 drawn by the plaintiff on a regular blank of the defendant was wholly immaterial, and not sufficient to excite suspicion as to the genuineness of the check in controversy. The last circumstance found by the jury is that the check was not filled out by the plaintiff, but there was nothing unusual, in this, even if the plaintiff had not been in the habit of having others fill out his checks. "The rule requiring the bank to know the customer's handwriting was always confined to a knowledge of his signature. Neither any rule of law nor the ordinary course of

Digitized by Google

business renders it a matter of suspicion that the body of the check or bill is not written in the handwriting of the maker or drawer." 2 Morse on Banks and Banking, § 480. The rule is stated in 2 Daniel on Negotiable Instruments, § 1654, as follows: "But a bank is not bound to know more than the signature of the drawer of the check; for in the ordinary course of business the body of the check is as often as otherwise filled up by a clerk, and it is by no means a matter of suspicion that it is not filled up in the handwriting of the drawer. If the rule were otherwise, a bank could never safely pay a check filled up in a handwriting not the drawer's, until it had inquired of the drawer whether it was properly filled up. And to require this would greatly embarass commercial transactions." To the same effect, see Reddington v. Woods, 45 Cal. 406, 419, 13 Am. Rep. 190; Bank of Commerce v. Union Bank, 3 Comst. (N. Y.) 230, 234; National Park Bank v. Ninth National Bank, 55 Barb. 87, 124.

If this check had been genuine, and the failure of the bank to pay it resulted in loss to the plaintiff, the bank would have been liable to him for all damages resulting therefrom, and none of the circumstances mentioned by the jury would have relieved the bank from its liability. Of course, a false or fraudulent alteration in any material matter in the body of the check after signature would have constituted technical forgery, and the bank would have been liable to the plaintiff, unless by some act of negligence upon his part he furnished the opportunity for the fraud which deceived the bank, in which case he must suffer the just consequences of his own carelessness, an bear the loss. The jury found that the plaintiff was guilty of negligence in signing his name to some blank or partly filled out paper in the hands of a stranger, and it is insisted that, on the facts found, judgment should be directed for the defendant. There was no motion or request for judgment notwithstanding the verdict, and it is unnecessary to consider the effect of this finding.

The motion to strike from the petition all allegations with reference to the payment of the $100 check and the giving of the letter of credit should have been sustained, since they were averments of immaterial facts which added nothing to the plaintiff's cause of action.

The failure of the jury to agree upon one of the most material issues in the case, as well as the inconsistent findings as to the negligence of the bank, require that the judgment be reversed, and a new trial ordered.

Decision No. 1110.

SHELTON IMPLEMENT CO v. SCHIECK et al.

(Supreme Court of Nebraska. June 4, 1908.)

116 N. W. 951.

BILLS AND NOTES — VALIDITY — FRAUD.

An agent for the sale of machinery took a note from a purchaser representing a commission or bonus on the sale, the amount of which he added to the purchase price. He also received from his principal "commission certificates" showing the

Digitized by Google

amount of commission due from his principal and payable when the notes given by the purchaser of the machinery were paid. Held, that the commission or bonus note exacted by the agent from the purchaser was voidable at the option of the maker.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 1. Appeal from District Court, Buffalo County; Hostetler, Judge.

Action by the Shelton Implement Company against Fred Schieck and Henry Schieck. Judgment for defendants, and plaintiff appeals. Affirmed.

W. D. Oldhan, for appellant. H. M. Sinclair, for appellees.

DUFFIE, C. The plaintiff brought this action on a promissory note made by the defendants, August 15, 1898, and due October 1, 1899. The facts surrounding the giving of the note as claimed by the defendants are as follows: In the fall of 1898 defendants purchased a threshing outfit from Russell & Co., of Council Bluffs, Iowa; such purchase being made through the plaintiff, who was agent for Russell & Co. at Sheldon, Neb. When the threshing outfit was delivered, it was settled for by the notes of the defendants, and the note in suit was signed at that time, and, as defendants supposed, as one of the notes going to Russell & Co. in payment of the threshing outfit. The defenses alleged against its enforcement are: First, that it was fraudulently obtained. Second, that the plaintiff was the agent of Russell & Co., and acted for Russell & Co. in selling the machine. Third, the statute of limitations. The case was tried to the court, and a judgment entered dismissing the plaintiff's petition.

The threshing outfit purchased by the defendants was second-hand machinery, and the plaintiff claims that the defendant executed the note in suit in consideration of its being able to obtain the machinery at a cut price. In support of this contention it introduced in evidence the following writing: "Shelton, Nebraska, August 2, 1898. This agreement made this day with James Stevens, provides that whereas I have ordered through the Shelton Implement and him a threshing outfit from the Russell Company of Cauncil Bluffs and on which there has been a cut made from the prices as quoted me by the said Shelton Implement Co., and James Stevens, to give him or them my note or notes, in the sum of $200, and due October 1, 1899, and secured on the same property and secured in all particulars as order given for machinery provides, said note or notes to draw same interest as said machinery, viz.: 6 per cent. Witness whereof I have hereunto affixed my signature the day and date as last above written. Fred Schieck." Both Fred and Henry Schieck testified that when the machinery arrived at Shelton they unloaded it from the car, and steamed up the engine for the purpose of going into the country about seven miles; that Stevens, who acted for the plaintiff requested them to sign the notes and mortgage before going away; that they went to his office where he had all the papers prepared, and, without reading them, they signed what they supposed were the purchase notes for the threshing outfit, and had no knowledge that the note in suit was

Digitized by Google

among the number; that no agreement had been made to pay Stevens or the plaintiff a bonus for securing the machinery.

The law is settled that an agent is not entitled to a commission from both seller and buyer, unless it is so agreed and understood by all parties to the transaction. Stevens, the manager for the plaintiff, contends that plaintiff was not an agent of Russell & Co., who sold this threshing outfit, and he offered in evidence several letters received from Russell & Co.'s manager in support of this contention. In one of these letters, of date July 12, 1898, and apparently referring to another transaction, Russell & Co.'s manager says: "You state that you think that you will be able to get such security as will insure both the amount going to us and to you for commission. We hardly see what you mean by this, unless you expect to take separate notes for commission. The way we sell goods through agents is this: The notes run to us, and the commission is payable to the agents pro rata as each note is paid. We issue the agent a certificate showing the amount of his commission in each note, this commission certificate to share in interest and expense of collection. Please make settlement with purchasers accordingly." The secretary of a Council Bluffs company, acting for Russell & Co., testified that the plaintiff, the Shelton Implement Company, or James Stevens, acted as agent for Russell & Co. in making this sale, and that the Shelton Implement Company received three commission certificates, one for $100, one for $375, and one for $192.50, to be paid as commission from the proceeds of the purchasers' notes when collected; that the only interest in the matter which the Shelton Implement Company had was its commission interest, which was payable as the notes were collected. It is true that the record shows that defendants did not pay their notes given Russell & Co. on the purchase of this outfit, and that their notes were returned to them on their surrendering the machinery to Russell & Co.; but the fact that the Shelton Implement Company, or Stevens who acted for it, accepted commission certificates from Russell & Co. for making the sale is ample evidence to support the finding of the court that the plaintiff was the agent of Russell & Co., and had contracted and agreed to accept from the company a commission for the sale. This being so, the note in suit is without consideration, and voidable, as an agent cannot make a valid contract where, in the same transaction, he acts as agent for both parties, unless that fact is disclosed. Levy v. Loeb, 85 N. Y. 365; Meyer v. Hanchett, 39 Wis. 419; Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168. An agreement between the agent of one party and another party to pay commission on a sale of his principal's property is void. Bollman v. Loomis, 41 Conn. 581.

In Porter v. Woodruff, 36 N. J. Eq. 174, the court said: "The moment an agent ceases to be the representative solely of his employer, and places himself in a position towards his principal where their interests may conflict, no matter how fair his conduct may be in the particular transaction, he ceases to be that which his service requires and his duty to his principal demands. In such cases the courts do not stop to inquire whether the agent has obtained an advantage, or whether his conduct is fraudulent or not, but if the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, the courts will not speculate con-

Digitized by Google

cerning the merits of the transaction, but at once pronounce it void as against public policy."

We are satisfied that the plaintiff or its manager, Stevens, was acting as agent for Russell & Co. in negotiating this sale, and that the note in suit, if not fraudulently obtained from the defendants, is voidable, as representing an agreement by the purchaser to pay a commission upon a sale made by the plaintiff as agent of Russell & Co., from whom certificates for the payment of a commission were also accepted. The evidence may well support a finding that the note was fraudulently obtained. If the testimony of the defendants is to be accepted, there was no understanding that plaintiff was to be paid by the defendants for securing for them this threshing outfit. When defendants were called to Stevens' office to "sign up" as they term it, the papers were all made out, and their signature was obtained on the understanding, on their part, that they were signing only the notes and mortgage representing the purchase price of the thresher. Nothing was said or heard of this until the last day of grace, when it was sued.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment of the District Court is affirmed.

Decision No. 1111.

ELLIOTT v. BRADY et al.

(Court of Appeals of New York. May 19, 1908.)

85 N. E. 69.

BILLS AND NOTES — ACTIONS — DEFENSES BY INDORSER — SALES — CORPORATIONS — STOCK — FRAUD — EFFECT — REMEDIES — PRINCIPAL AND SURETY — ACTIONS AGAINST SURETY — DEFENSES — PRINCIPAL AND AGENT — RIGHTS OF UNDISCLOSED PRINCIPAL — ACTION ON SEALED CONTRACT — VALIDITY — FRAUD BY SELLER — WAIVER.

1. Defendants negotiated with plaintiff for the purchase of certain stock in a car company, but the contract, which was under seal, was signed by plaintiff and one P., who acted for defendants, and, as part payment therefor, plaintiff accepted a note executed by a corporation organized to hold the stock purchased, and indorsed by it and defendants, which note was renewed several times. In an action against defendants, as indorsers on the note, they alleged false representations as to the assets of the company, and that the contract was made and the notes indorsed by defendants in reliance thereon. Held, that defendants were not parties to the contract, and hence could not set up fraud by plaintiff in making it, as the only person who can rely on a written contract under seal are the parties thereto and their assigns.

2. If plaintiff induced a purchase of stock by fraudulent representations, the buyer could either repudiate the contract and upon returning the stock receive the

Digitized by Google

consideration paid therefor, or could affirm the contract and bring an action for damages sustained by reason of such fraud.

3. A surety, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counterclaim, as it is for the principal to determine what use he will make of such cause of action, and the surety has no control over it.

4. One may not claim that a written contract under seal was executed by a party thereto as his agent, and that he is the real, though unnamed, principal, as a person not a party to a sealed contract cannot show that a party thereto acted as agent for him.

5. Where plaintiff sold certain stock to another, who bought as agent for defendants, and received in part payment notes signed by defendants as sureties, even if the purchase was induced by fraudulent representations by plaintiff, defendants, by renewing their indorsements upon the notes after learning of the alleged fraud, thereby affirmed the contract and waived the fraud.

Appeal from Supreme Court, Appellate Division, First Department.

Action by James M. Elliott, Jr., against James Brady and others. From a judgment of the Appellate Division of the Supreme Court (118 App. Div. 208, 103 N. Y. Supp. 156), affirming a judgment for plaintiff upon a directed verdict, defendants appeal. Affirmed.

Edward W. Hatch and Charles J. Hardy, for appellants. Herman Aaron, for respondents.

CHASE, J. Judgment has been obtained against the appellants on four promissory notes made by the Industrial Securities Company to its order, and indorsed by it and by them. In October, 1902, negotiations were entered into by the appellants with the respondent relating to the purchase of a controlling interest in the stock of the Southern Car & Foundry Company. The terms of a contract for such purchase were agreed upon, and it was further agreed that the contract should be made with one Paine. On October 21, 1902, the respondent and said Paine entered into a written contract under seal by which the respondent agreed to sell to Paine $600,000 par value of the preferred stock of the Southern Car & Foundry Company and $600,000 par value of the common stock of said company at the price of $100 for one share of each of said stocks, and the said Paine agreed to accept said stocks and pay therefor as stated. The contract further states with some detail the agreement between the parties, including a provision that the deliveries of said stock shall be made at the Trust Company of America in the city of New York, as trustee or agent of said Paine, to accept deliveries of the stock in his behalf and to make payment therefor in accordance with the terms of the contract, and the said Paine also agreed to accept further deliveries of said stock at said price to the extent of $150,000 par value of each class of stock if tendered to him within thirty days from the date of the contract. Thereafter said Industrial Securities Company was organized. On or before the 30th day of October, 1902, $689,900 of the par value of each of said stocks was delivered and paid for pursuant to said written contract, and the plaintiff and said Paine signed an indorsement on said contract as follows: "It is hereby acknowledged and declared by the parties hereto that there have been delivered and fully

Digitized by Google

paid for under the terms of the foregoing contract sixty-eight hundred and ninety-nine shares of the preferred and the same number of the shares of the common stock of Southern Car & Foundry Co. Dated — Oct. 30, 1902."

The appellants allege in their answer that they caused the Industrial Securities Company to be organized to take and hold the stock of said Southern Car & Foundry Company, and that said company succeeded to the rights of Paine under the written contract, and also that the stock was delivered as directed by them. The stock was delivered to Paine pursuant to the contract, as appears by the receipt, and it was presumably turned over by him to the Industrial Securities Company. The facts do not permit the appellants to claim that any of the stock was ever delivered to them individually, and it does not appear what interest they had or have in the Industrial Securities Company. As a part payment for said stocks, the plaintiff accepted in lieu of cash a note made by said Industrial Securities Company to its order and indorsed by it and the appellants for $259,900 payable on demand. No new and independent agreement on the part of the appellants with the plaintiff relating to said note and the indorsements thereon has been shown. It appears conclusively by the answer of appellants, as well as by the testimony of such of the appellants as were sworn as witnesses upon the trial, that the note was given upon the purchase price of said stocks and in part compliance with the written contract made with Paine. Within thirty days thereafter, payment of said note was demanded, and at the request of the appellants the holder thereof accepted in renewal thereof five other notes of $50,000, each payable in four months, and a note of $9,900, payable on demand, all of which were signed by said Industrial Securities Company and indorsed by it and by the appellants. The $9,900 note was paid, but when the five other notes became due the appellants sought to renew them, and after some negotiations the appellants paid thereon $125,000, and the time to pay the remainder of $125,000 was extended by the four renewal notes dated, respectively, March 21, 25, 27, and 31, 1903, upon which notes the judgment against the appellants has been obtained. The appellants claim that the respondent, for the purpose of inducing them to enter into a contract for the purchase of said stock, made false and fraudulent representations as to the assets of said Southern Car & Foundry Company, and that said contract was made by said Paine, and said notes were indorsed by them, in reliance upon the truth of such representations. They seek in this action to defeat a recovery by the respondent because of said fraud.

For the purpose of this appeal we will assume that the alleged false and fraudulent representations were made by the respondent, that Paine relied thereon in making the contract, and that the appellants indorsed the note of $259,900 and the first renewals thereof believing that such representations so made by the respondent were true. The fundamental difficulty with the appellants' contention is that they are not parties to the contract as made. The contract is between the respondent and Paine. The appellants did not become bound thereby or liable to the respondent in case of failure to perform the agreements therein contained. If Paine has been damaged by said false representations, he has not asserted it. If, as we as-

Digitized by Google

sume, a fraud has been committed, Paine could repudiate the contract, and, after returning the stock, ask them to return to him the consideration paid therefor, or he could affirm the contract and bring an action upon the facts to recover damages for the injuries which he has sustained by reason of such fraud. He has not done either of these things. The only persons who can bring an action upon a written contract under seal are the parties to it or their assigns. So far as appears from the record, the only legal relation that the appellants sustain, if any, to this transaction, is as sureties for a corporation which they allege became the successor to Paine. A party, when sued upon his obligation, cannot avail himself of an independent cause of action existing in favor of his principal against the plaintiff as a defense or counterclaim. It is for the principal to determine what use he will make thereof, and the surety has no control over him in this respect. Lasher v. Williamson, 55 N. Y. 619; Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Newton v. Lee, 139 N. Y. 332, 34 N. E. 905; American Guild v. Damon, 186 N. Y. 360, 78 N. E. 1081.

It cannot be claimed by the appellants that the written contract was executed by Paine as their agent, and that they are the real principals, though not named in the instrument. Denike v. De Graaf, 87 Hun, 61, 33 N. Y. Supp. 1015, affirmed on opinion below, 152 N. Y. 650, 47 N. E. 1106; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Schaefer v. Henkel, 75 N. Y. 378; Kiersted v. Orange & Alexandria R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199.

It further appears that all of the appellants were fully aware of the alleged fraud in January, 1903. They indorsed the several notes in suit on or about the day of their dates in March, 1903, with full knowledge of the alleged fraud. Treating the notes as evidence only of a part of the unpaid consideration for the stock, the renewal thereof with full knowledge of the fraud was an affirmance of the contract.

The view we have taken of this case makes it unnecessary to consider the rulings of the court upon exceptions to the receipt or exclusion of evidence upon the trial.

The judgment should be affirmed, with costs.

CULLEN, C. J. While concurring in the opinion of Judge Chase, I desire to add this: It would be a good defense to the appellants' liability as indorsers of the note in suit to show that such indorsement was obtained by fraud, and I concede the claim that the fraud practiced on the vendee in the contract of sale might be the same fraud which induced the indorsement of the obligation of the vendee for the purchase money. In pleading such a fraud the indorsers would be availing themselves neither of the vendee's right to rescind the contract nor of the latter's cause of action for damages. But the difficulty in this case is that the indorsement of the appellants on the note sued upon was made after their knowledge of the fraud practiced on the vendee and was given with such knowledge to secure a renewal of the original note for which the note in suit was substituted. Therefore the appellants' relief, if any, must be had in an equitable action, as suggested in Gillespie v. Torrance, 25 N. Y. 306, 82 Am. Dec. 355.

Digitized by Google

GRAY, HAIGHT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur with CHASE, J., and CULLEN, C. J., concurs in memorandum.

Judgment affirmed.

Decision No. 1112.

COX v. CLINE et al.

(Supreme Court of Iowa. July 9, 1908.)

117 N. W. 48.

BILLS AND NOTES — BONA FIDE PURCHASER — INSTRUCTION — BURDEN OF PROOF — FRAUD — RESCISSION.

1. In an action by an indorsee of a note, an instruction that the burden was on plaintiff to establish that he was the owner of the note, that he acquired it in the ordinary course of business before maturity, and, should the jury so find after a careful consideration of all the evidence in the case, they should find for plaintiff, unless they found that defendants had shown by a preponderance of the evidence that the note was secured by fraud, and that plaintiff at the time he acquired the paper had actual knowledge of the fraud or facts and circumstances requiring inquiry as to the validity of the note, and that his failure to do so amounted to bad faith, was erroneous as ignoring the rule that mere possession of the note raised a presumption without other evidence, that plaintiff was a holder in good faith, and, having shown possession, was not bound to give affirmative evidence that he acquired title in due course of business and without notice of fraud, until it had been shown that the instrument was procured or put in circulation by fraud.

2. Where a note was shown to have been tainted by fraud in its inception, or was fraudulently put in circulation, the burden was placed on plaintiff by Code Supp. 1907, §§ 3060a55, 3060a59, to show that he acquired it innocently, but such proof was not required of plaintiff until defendant offers evidence to sustain such defense.

3. Where, in a suit on a note, defendants proved that it had been obtained from them by fraud, then the further inquiry was not whether defendants had shown that plaintiff took the note with notice of the fraud, but whether plaintiff had shown that he took it in good faith and without notice.

4. Where a note sued on was given for the price of a horse, defendants, in order to rescind the sale for fraud perpetrated by the sellers in obtaining their signatures to the note, were not required to return the horse to the sellers as provided by the contract of sale in case of a breach of warranty, but were entitled when the fraud was discovered to rescind by making a bona fide offer to return the horse and hold it in readiness to be delivered if the offer to return was refused.

Appeal from District Court, Johnson County; R. P. Howell, Judge.

Action upon a promissory note. Judgment for defendants and plaintiff appeals. Reversed.

Wade, Dutcher & Davis, for appellants. Holbert & Holbert, for appellees.

WEAVER, J. The note in suit was given for the purchase price of a stallion. The defendants resisted payment on the ground that

Digitized by Google

the note was procured by fraud, and that plaintiff is not a bona fide holder. The cause was twice tried in the court below; a verdict for defendants being returned in each instance.

1. In its charge to the jury the trial court, after stating the issues, proceeded as follows: "Seventh. The burden is first upon the plaintiff to establish that he is now the owner of the note sued upon, that he acquired the same in the ordinary course of business and before the same was due, and, should you so find from a careful consideration of all the evidence in this case, you will then find for plaintiff, unless you find that the defendants have shown by a preponderance of the testimony that this note was secured through fraud; that is, that their signatures thereto were secured through false and fraudulent representations, and that the plaintiff at the time he acquired the paper had actual knowledge of such fraud, or that such facts and circumstances were brought to his knowledge before the purchase of the note as would require that he should in good faith inquire as to the validity of the note, and unless you should find that such failure to inquire amounted to actual bad faith." In giving this paragraph the court omitted to note the well-established rule that the mere possession of the note by the plaintiff raises a presumption, without other evidence, that he is a holder in good faith, and it is not until it has been shown by appropriate evidence that the instrument was procured and put in circulation by fraud that any burden is cast upon him to explain his possession, and give affirmative evidence that he acquired title in due course of business and without notice of the fraud. Lathrop v. Donaldson, 22 Iowa, 234; Shaulis v. Buxton, 115 Iowa, 430, 88 N. W. 968. Counsel for appellee say that the instruction under consideration is not inconsistent with this rule; the burden being upon the plaintiff under the pleadings, though removable for the time being upon production of the note in evidence. But the trouble with this suggestion is that the court did not thus explain or qualify its statement. On the contrary, it told the jury that to make his case the plaintiff must first "establish that he is now the owner of the note sued upon, that he acquired the same in the ordinary course of business and before the same was due," and, so far from telling the jury that any presumption of ownership or good faith arises in plaintiff's favor from the possession of the note, they were instructed to determine the question "from a careful consideration of all of the evidence in the case." This placed upon the plaintiff a burden materially greater than the law warrants. It is probably true that the correct rule can be deduced from other instructions given, but this we think cannot serve to remove or neutralize the prejudice presumably resulting from the unqualified statement in the seventh paragraph. In thus holding we do not ignore or minimize the rule approved by the great weight of authority and applied by us in McKnight v. Parsons, 113 N. W. 858, that, where the note is shown to have been tainted by fraud in its inception or fraudulently put in circulation, the burden rests upon plaintiff to show that he acquired it innocently. The rule is also now embodied in our statute (Code Supp. 1907, §§ 3060a55, 3060a59), but until the defendant offers evidence sustaining such defense the plaintiff is under no obligation to negative it or to assume the burden of showing that he is the holder in good faith and without notice.

Digitized by Google

2. Appellant argues that there is no evidence from which the jury could rightfully find that he was not the holder in good faith in due course of business. But this is a somewhat misleading statement of the point to be considered. The defendants assert that the note was obtained by fraud, and offered evidence in support of their defense. If the jury found that allegation to be established, then the inquiry remaining to be answered was not so much whether defendants had succeeded in showing that the note was taken by plaintiff with notice of the fraud, as it was whether plaintiff had succeeded in showing that he took it in good faith and without notice, which is a very different proposition. In view of the fact that the cause must be again tried, we shall not review the testimony bearing upon this issue, but simply say that we think the case was in this respect one for the jury.

3. The further point is made that the matters complained of did not amount to a fraud, but to this we cannot agree. In our judgment the answer states a good defense to the note as against the payee, or any holder thereof with notice, and there was evidence tending to sustain such defense. Again, it is said by counsel that the warranty upon which the sale was made provides for the return of the animal to Galesburg, Ill., in case of its failure to fill the terms of the agreement, and that defendants, having failed to so return it, cannot rescind the purchase and refuse to pay the agreed price. If the defense relied upon by the defendants and submitted to the jury were a breach of warranty merely, there would be much force in the argument thus advanced. But such is not the case. The sole defense submitted to the jury is that which is based on an alleged fraud by which defendants were induced to sign the note on the representation that one Stover who joined them in making the instrument had agreed to become a party to the purchase of the horse and pay his equal share with the other purchasers, when, as it afterwards transpired, Stover was in fact acting as a stool pigeon in the interests of the payee, and, when the defendants' signatures were secured to the note, he was released from all liability thereon without any consideration, except his assistance in perpetrating the fraud. Under such circumstances, the defendants were not obliged to assume the expense and responsibility of shipping the horse to Illinois to effect a rescission of the purchase. To hold otherwise is to say that, when a contract has been obtained by fraud, the innocent party must perform a part of its stipulations in order to rescind and repudiate the remainder. If a contract has been obtained fraudulently, the taint attaches to and affects all its stipulations alike. If the party acts with reasonable promptitude when the fraud is discovered, a rescission of the contract will be effected by a bona fide offer to return the consideration received and by holding it in readiness to be delivered if the offer to return be refused.

Other questions argued are ruled by those already disposed of or are such as will not necessarily arise on a retrial.

For the reasons stated in the first paragraph of this opinion, a new trial must be ordered, and the judgment appealed from is therefore reversed.

Digitized by Google

Decision No. 1113.

LIVINGSTAIN v. COLUMBIA BANKING & TRUST CO. Ex parte BERGER.

(Supreme Court of South Carolina. September 3, 1908.)

62 S. E. 249.

BANKS AND BANKING — PAYMENT OF DEPOSITOR BY INSOLVENT BANK — RIGHTS OF WITHDRAWING DEPOSITOR — "INSOLVENT."

1. Money paid by a bank to a depositor in the usual course of business while the bank is a going concern, although in fact insolvent, is not impressed with a trust in favor of other creditors, where the depositor did not know the fact of insolvency, and was assured by the officers that the bank had money to pay all depositors, even though he was induced to withdraw the money by rumors of its embarrassment.

2. Petitioner made a check on a bank for the amount of his deposit therein, and received payment in money in the usual course of business. He was induced to withdraw his deposit by rumors that the bank was in difficulty, and the knowledge that there had been a run on it for the previous two days. He inquired of the officers, however, and was told that the bank was solvent, and would pay all checks as presented. After receiving and counting the money, believing such statements in good faith, he returned it, and took drafts for the amount. The bank was in fact insolvent, and was declared insolvent the next day. The drafts were not paid because the bank on which they were drawn applied the fund to the payment of notes of the insolvent bank, which it held, and which were secured by collateral. Held, that the money which petitioner received was not impressed with any trust in favor of other creditors, and that he stood in the same position as any purchaser of the drafts for cash, and was entitled in equity to be subrogated to the rights of the bank on which they were drawn in the collateral which it held.

Woods, J., dissenting.

3. A bank is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands.

Appeal from Common Pleas Circuit Court of Charleston County; R. W. Memminger, Judge.

Action by Harris Livingstain against the Columbia Banking & Trust Company, in which Martin K. Berger filed an intervening petition against the receivers appointed, B. A. Hagood and E. W. Hughes. From a decree denying the petition, petitioner appeals. Reversed.

See 57 S. E. 182.

Legare, Holman & Baker, for appellant. Benj. H. Rutledge, for respondent.

GARY, A. J. The record contains the following statement: "After the Supreme Court of this State filed its opinion in the case of Livingstain v. Columbian Banking & Trust Co., 77 S. C. 305, 57 S. E. 182, the said Martin K. Berger filed his petition and affidavit, setting forth that he came within the exception, as recognized in said de-

Digitized by Google

cision, and was entitled to subrogation, for that he obtained New York exchange, drawn on the National Bank of Commerce, for and in consideration of cash money paid into the bank. The defendant's receivers controverted the position of Berger, and gave a different version of the position, under which the said New York exchange was obtained. His honor, Judge Gage, presiding, said that he could not determine the question on affidavits, and therefore referred the matter to G. H. Sass, Esq., one of the masters of said county, to take the testimony and report conclusion of fact thereon, with all reasonable dispatch. The master made his report, stating and setting forth his finding of fact, and no exception was taken thereto; that the bank was not put in the hands of a receiver until the 9th day of February, 1906." The master's findings of fact are as follows: "That the petitioner, Martin K. Berger, holding, along with his wife, certain deposits in the Columbian Banking & Trust Company, and being advised by rumors that the affairs of the bank were in an unsatisfactory condition, determined to withdraw the said deposits, and that on the 8th of February, 1906, he sent his wife to the bank with the two checks representing their combined deposits, and amounting to $2,015.75. Mrs. Berger presented the checks at the teller's window, and the same were paid to her in about one-fourth in currency and the balance, $1,500, in three bags of silver dollars, containing $500 each. Finding that the silver was too heavy for her to remove, she called to her husband, who had by this time reached the bank, and turned the money over to him. He received the same from the teller. The testimony is conflicting as to whether he removed the money from the window and carried it to another counter to count it, but there is no doubt at all that he did receive the money, and did count the currency. After having thus received the money from the bank, he resolved to exchange the same for a check on New York, and paid the money back to the teller, and requested that he would give him a New York check for the amount. This was done, and the said check upon New York was taken by Mr. Berger to the Bank of Charleston on the same day, and deposited to his account in that bank. I find that these were two separate and distinct transactions; that is to say, that the depositor's check was paid by the bank in the manner above stated, and that transaction closed, and that immediately thereafter the New York check was purchased with the same money which had been paid to Mr. Berger upon the depositor's checks." In refusing the petition, his honor, the presiding judge, assigned the following reasons: "The bank was insolvent when Berger put his money back there, and it became again an asset available for all, to be distributed among them under high principles of equity and justice. It has judicially been determined that the bank was insolvent on February 8, 1906, the date of this Berger transaction. Therefore all its assets constituted a trust fund, and could not lawfully be paid over to any one certain creditor in preference to others. Berger heard rumors of the insolvency, and, acting on that belief, went to draw out his money, and received the amount of his deposit. The money he received was not held by him as an innocent outside customer of the bank, but was really part of a trust fund, which was the property of all the creditors; therefore he was not within the exception set forth from the case cited. 77 S. C. 305, 57 S. E. 182. Under the statute

Digitized by Google

in bankruptcy any payment to a person having reason to believe that the payer is insolvent is a void act. Equity will not go beyond this principle. Berger never parted with the money, so that its identity was lost. The identification of the money is important here, because it affects the bank with knowledge that the money for which it exchanged the New York draft was not 'cash paid into the bank,' but was really the money of the general depositors, part of a trust fund which the bank had no right to apppropriate to Berger's check."

The assignments of error are as follows: "First. Because his honor erred in dismissing the petition of the said Martin K. Berger, in that the undisputed testimony in the case showed, from the report of the master, that Martin K. Berger paid into the Columbian Banking & Trust Company the sum of $2,015.75, and obtained from said bank a check on New York, drawn on the National Bank of Commerce, and that the same was drawn to his order by said bank in good faith, and without any knowledge on the part of the said Martin K. Berger that the said bank was insolvent, and that therefore the said Martin K. Berger was subrogated to the right of the National Bank of Commerce to the collateral, which it held to secure a note, which was discharged by applying money against which this check was drawn in favor of Martin K. Berger.

"Second. Because his honor erred in holding that the Columbian Banking & Trust Company was insolvent when Berger put his money back there, and that it became again an asset of the bank for the purpose of distribution among the creditors and depositors of the bank, 'under high principles of equity and justice,' whereas his honor should have held and found that Berger did not put his money back into the bank, but on the contrary that he purchased in good faith, while the bank was a going concern, New York exchange for $2,015.75, and that he should have been held subrogated to the assets held by the National Bank of Commerce to the collaterals, which were deposited as a security to a note, the money on which, said check being drawn, having been exhausted in the payment of said note.

"Third. Because his honor erred in holding and concluding that the money received by Berger from the bank on his check, while it was a going concern, was a part of the trust fund, which was the property of all the creditors.

"Fourth. Because his honor should have held and concluded that, when Berger drew his money out of the bank, while it was a going concern, he had a right to do so, and that after it was withdrawn from said bank, it was not impressed with any trust or equity in favor of the other depositors of the bank, and that Berger had a right, if he saw fit, to purchase said New York exchange.

"Fifth. Because his honor erred in holding that the Columbian Banking & Trust Company was judicially determined to be insolvent, on the 8th day of February, 1906, the date that Berger obtained New York exchange, whereas, on the contrary, said bank was not adjudged insolvent until the 9th day of February, 1906; and there is no evi dence going to show any knowledge or notice of such insolvency, further than a reported rumor that the bank was in an embarrassing condition."

The vital question in the case is whether the money when paid to the petitioner by the bank was impressed with a trust. His honor,

Digitized by Google

the presiding judge, based his conclusion on two grounds: (1) The insolvency of the bank, and (2) that "Berger heard rumors of the insolvency, and, acting on that belief, went to draw out his money, and received the amount of his deposit." The circuit judge should also have found from the uncontradicted testimony that, conceding there was enough to put the petitioner upon inquiry, he followed it up with due diligence by going to the proper sources of information — the officers of the bank — and became satisfied the bank was insolvent.

M. K. Berger, the petitioner, testified: "I had a conversation with several of the men, one of which was Mr. Pearlstine, and several others who knew the circumstances of the bank; and they assured me that they would pay out every dollar to the depositors. . . . I took it [the money] from the window, and counted all the money — the paper money. Then I started to count the silver; then I decided to help out the bank, and I asked the cashier of the bank, Mr. Seel, to be so kind as to give me a New York exchange for the money, which I paid him in cash. . . . Q. They had satisfied you about the solvency of the bank? A. Yes, sir. . . . Q. About what time of day did you get this money? A. About 10:30, I think. Q. And the bank did not close until next day? A. I think so." Mrs. Bessie Berger, wife of the petitioner, testified as follows: "Q. Do you remember whether anybody went to the window after Mr. Berger left? A. Why, yes; plenty of people went to the window. Q. Did anybody go to the teller's window between the time that Mr. Berger took the money to the teller's window and brought it back? A. Yes. Q. They were paying out everybody? A. Yes. Q. Looked like the bank had plenty of money? A. Yes, had plenty of money, and one of the officers came there, and he said: 'We have all the money to pay you off. There is too much excitement here.' Also Mr. Pearlstine came there, and he said: 'Don't you all rush. Just take your time, and we will pay you all.'" F. J. Seel, cashier, testified as follows: "Q. Do you remember what day there was a run on the bank? A. It started on the 6th and wound up on the 8th. Q. You were engaged in paying over money on the 8th? A. Yes. . . . Q. What time of day was that? [payment to the petitioner]. A. That was about half-past 11. Q. The bank closed when? A. When it had no more money to pay. Q. It stopped paying, and put up the sign 30 days? A. It stopped paying about 12. I do not know what hour the sign was put up. Q. About 12 or 1 o'clock you stopped paying? A. We stopped paying everybody. We had no more money."

The testimony does not show that the payments were made under the belief that the bank was insolvent, nor in contemplation of insolvency, nor with a design to give a preference to those receiving payment over the other creditors of the bank, but with the expectation that the bank would be able to continue business. On the contrary, the bona fides of the petitioner was clearly established, and his confidence in the solvency of the bank was shown by the fact that he deposited his money with it, after the assurance of the officers that all would be paid, after knowledge of the fact that the bank had stood the run upon it from the 6th to the 8th; after seeing that the bank was conducting its business in the usual way — paying the drafts over the counter in the order in which they were presented; and after determining that he would assist in restoring confidence in others, and

Digitized by Google

thereby enable the bank to meet all demands. "A bank is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands." 3 Encyc. of Law, 847. "The keeping of the bank open, and the conducting of its business in the usual manner, constituted a representation to its customers of the solvency of the bank, upon which they had a right to rely; and, if the bank was known to be insolvent by the officers who were charged with its management, the concealment of that fact from a person about to deposit would constitute a fraud upon him. The title acquired by the bank to the money and checks deposited under such circumstances would be voidable at the election of the depositor, who would bring suit to recover his deposit, without any previous demand. The bank would become a trustee ex maleficio, and would hold the deposit for the use of the depositor, and subject to his right of reclamation." Wasson v. Hawkins, (C. C.) 59 Fed. 233. In the case of McGregor v. Battle, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, the rule is stated that, "if a bank, though insolvent, is still conducting its business, and pays a check of a depositor in the usual course of business, and the depositor had no notice of the insolvency of the bank, the payment is good, and the depositor will be protected. If, however, the depositor is paid, not in the usual course of business, but at a time when he has notice or knowledge that the bank is insolvent, and that the intent of the bank is to create a preference in his favor over other creditors, the payment is not good." Syllabus.

In that case the court uses this language: "It is a well-known fact that the suspicion that a bank is insolvent causes all depositors who are acquainted with the facts leading to the suspicion to rush at once and withdraw their deposits. A run on a bank is always produced by those who think they have reason to suspect that the bank is in a failing condition and we are not prepared to hold, if a bank is still in operation, open during the usual hours of business, paying its checks in the order in which they are presented, according to the custom of the bankers, that a depositor, who merely had reason to suspect the solvency of the bank, this being the motive for his drawing a check, would be required to repay to the bank the amount so withdrawn, less what would be his pro rata share in the assets of the bank, on the day that the amount was withdrawn, in the event that the bank was afterwards forced to liquidation, and was, in fact, insolvent. Neither are we prepared to hold that one who actually knows that a bank is insolvent, but does nothing except to draw his check and present it, and receive payment over the counter, in the usual course of business would be required to refund the amount so withdrawn, less his pro rata share, upon a final winding up of the affairs of the bank." Even under our assignment law against undue preferences (Civil Code 1902, § 2647), the question whether the payment made by the debtor is obnoxious to the statute depends upon the intention of the parties to create a preference, and the foregoing facts would not render the payment illegal. Porter v. Stricker, 44 S. C. 183, 21 S. E. 635. Having reached the conclusion that the money when received by the petitioner was free from a trust, the case comes within the principle announced by Mr. Justice Woods in

Digitized by Google

Livingstain v. Banking Co., 77 S. C. 305, 57 S. E. 182: "Had the checks been issued for cash paid into the bank or before insolvency, the other depositors could have interposed no countervailing equity, and the petitioners would have been subject to subrogation."

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded for such proceedings as may be necessary to carry into effect the views herein expressed.

WOODS, J. (dissenting). I think the judgment of the Cicruit Court is sustained by the principles stated and the reasoning of the court in the former appeal (77 S. C. 305, 57 S. E. 182). The facts are exactly the same as there appeared, except that Berger has since filed another petition, and under it has shown that, instead of taking from the Columbian Bank a check on the Bank of Commerce in direct payment of his deposit, he received from the Columbian Bank the cash for it, and almost immediately, without leaving the bank, paid it back to the Columbian Bank, taking in its place the check on the Bank of Commerce. The question is, whether, under these circumstances, the bank being insolvent at the time, and its assets being now in the hands of the court for ratable distribution among all creditors, Berger must be held to have an equity against the depositors to the collateral held by the Bank of Commerce. It is argued this conclusion results from the words in brackets below, taken from the opinion in the former appeal: "Therefore, the issuing of the checks to these depositors was inequitable with respect to other depositors, because the bank was actually then insolvent, and all of the depositors had the equity of equal distribution of the assets, including surplus arising from the collateral held by the Bank of Commerce. The right of the Columbian Bank is not in question, and with that the court will not interfere, but it is very clear that the court should not stretch out its arm and by affirmative action, under the guise of subrogation, confer on the petitioner a lien on the collateral, thus defeating equitable distribution among all of the creditors to promote an inequitable preference. [Had the checks been issued for cash paid into the bank, or before insolvency, the other depositors, could have interposed no countervailing equity, and the petitioners would have been entitled to subrogation.] But the insuperable objection to subrogation in the case as presented is the fact that the checks were issued in payment of the debts of the bank after insolvency, and when the court, at the very moment they were issued, would have taken charge of the bank's assets, and would have enjoined the issuing of the checks, to the end that an equal distribution should be made among creditors, without preference to any." 77 S. C. 311, 57 S. E. 184. The context shows the court in the sentence relied on was laying down the general proposition that, if the isolated fact had appeared that these parties, in the ordinary course of business, had paid their money to the Columbian Bank for the purchase of checks on the Bank of Commerce, then they would have been entitled to be subrogated to the rights of the Bank of Commerce in the collateral held by that bank. But much more that is vital appears here than the mere isolated fact that the petitioner purchased a check for cash.

The court of equity looks through the form to the substance, takes into account all the circumstances, and from all the facts determines

Digitized by Google

the nature of the transaction and the rights of the parties. It may be assumed that Berger actually drew his deposit in cash from the bank, that he did not know the bank was insolvent, and that he could not have been compelled to refund the money so drawn to the receivers, though there was a run on the bank at the time. Yet it does not follow from all this that substantial justice requires that he should receive at the hands of the court of equity, the special consideration of subrogation against the interests of other creditors. It is always to be borne in mind that Berger, as holder of the check, has no legal right whatever to the collaterals in question. For him to induce the court to take them from the receivers and bestow them upon him he must convince the court he ought to have a preference in equity and good conscience. It may be the court could not have warrant in the statute law or common law, or even under the principles of equity, to take away from a depositor the preference he obtains when payment is made to him under such circumstances; but it by no means results that the court will set aside legal rights to aid such a preference. When petitioner's deposit was paid to him, the bank was insolvent; that is, in the condition in which the principles of equity required a ratable distribution, among all its creditors with preference to none, of all its assets, including the money representing petitioner's deposit which was paid to him. The repayment by Berger of the money into the bank for the check was merely an immediate restoration of conditions which enabled the court to carry out the principle and policy of equity to require equal distribution. Subrogation is a pure, unmixed equity having its principles, not in any fixed law, but in the principles of natural justice. Gadsden v. Brown, Speer's Eq. 41; Ex parte Reynolds, 68 S. C. 438, 47 S. E. 728; American Bonding Co. v. National Bank, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 480. The proposition to allow to the defendant the advantage of subrogation therefore means that natural justice requires a court of equity to stretch out its arm to make good to one creditor of a bank a preference over all others, to which he has no legal right. The equity of equal distribution is the paramount equity, but, regarding the equities equal, the legal right represented by the receivers should prevail. Galphin v. McKinney, 1 McCord, Eq. 280. At the moment of insolvency of the bank substantial justice, which in this case is that equality which equity always seeks to enforce, required ratable distribution of the assets. The payment to Berger of his deposit operated as a preference, whether unlawful or not, and tended to defeat the equity, the substantial justice of ratable distribution.

Looking at the transaction as a whole, therefore, the petitioner's contention comes to this: A preference over other creditors of an insolvent bank was obtained, which a court of equity would have enjoined with the real facts before it. After that preference, and by virtue of it, and with the funds obtained through it, a check was issued on the Bank of Commerce which was in effect a second assignment of funds of the Columbian Bank held to its credit by the Bank of Commerce. But this check amounted to nothing in law, because the prior claim of the Bank of Commerce had absorbed the fund on which it was drawn. Nevertheless the court of equity is asked to make good the preference it would have refused to allow by subro-

Digitized by Google

gating to the payment of the check the collateral held by the Bank of Commerce, now in the hands of the court, for the administration of equity of ratable distribution. It seems to me the statement of the proposition carries its own refutation.

Decision No. 1114.

BANK OF GUNTERSVILLE v. JONES COTTON CO.

(Supreme Court of Alabama. April 16, 1908. Rehearing Denied June 18, 1898.)

46 So. 971.

BILLS AND NOTES — NEGOTIABILITY — DRAFT WITH BILL OF LADING — SALES & DELIVERY TO CARRIERS — PASSING TITLE — CARRIERS — BILLS OF LADING — INDORSEMENT AND TRANSFER — TITLE TO PROPERTY — PURCHASER BEFORE MATURITY — RIGHTS — FAILURE OF CONSIDERATION — APPEAL AND ERROR — REVIEW — QUESTIONS OF FACT — JUDGMENT ON AGREED STATEMENT.

1. An accepted sight draft for the price of a bale of cotton, with bill of lading attached, indorsed and negotiated by the payee, is governed by commercial law.

2. Where S., having purchased from G. a bale of cotton which was subject to a landlord's lien, instructed G. to ship the cotton to the J. Co., the delivery of the cotton to a common carrier by G., consigned pursuant to such instruction, divested the title to the cotton out of G.

3. The indorsement of a draft for the price of cotton sold, with the bill of lading attached, by the seller, who was the payee, to plaintiff bank for discount, did not vest the legal title to the cotton for the sale of which the draft was drawn in the bank, nor constitute the bank the seller of the cotton.

4. Where a bank discounted a draft with a bill of lading attached before maturity, in the ordinary course of business, the drawee and acceptor could not, when sued on the draft, plead failure or want of consideration.

5. Where a case was tried without the intervention of a jury on an agreed statement of facts, the Supreme Court on appeal was authorized by Acts 1894–95, p. 586, to review the conclusion and judgment of the trial court on the evidence, without any presumptions in favor of the trial court's rulings, and in case of error to render such judgment as the trial court should have rendered.

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Suit by the Bank of Guntersville against the Jones Cotton Company. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

The cause is tried upon the following agreed statement of facts: "That M. T. Swift, on April 4, 1906, agreed to purchase one bale of cotton from A. B. Gibson, in Marshall county, Ala., to be shipped by Gibson to the Jones Cotton Company at Decatur, Ala. That on said date a bill of lading was issued to A. B. Gibson by the Tennessee River Navigation Committee, agreeing to transport said bale of cotton to Decatur, Ala. That on said date M. T. Swift drew a draft for

Digitized by Google

$56.08 on the Jones Cotton Company at Decatur, Ala., as shown by draft hereto attached. That said A. B. Gibson on said date sold said draft, with bill of lading attached, to the Bank of Guntersville, and indorsed said bill of lading and said draft to said Bank of Guntersville, which draft and bill of lading and indorsements thereon are hereto attached and made a part of this agreement. Said draft and bill of lading was delivered to said Bank of Guntersville at the time of the sale thereof to said bank; said bank paying said Gibson the sum of $56.08, less the customary bank discounts. That at the time said draft was drawn and bill of lading issued one S. C. Capehart, of Columbus City, Marshall county, Ala., held a landlord's lien on said bale of cotton in a sum equal to or exceeding the value of said bale of cotton by reason of the same having been grown on the land of said Capehart, located and situated in Marshall county, Ala., in the year 1905, through a rent contract for lands between said Capehart and said Gibson for said year, and that said rent was due and unpaid and lien undischarged at the time said bale of cotton was sold by Gibson and said draft and bill of lading issued. That said Swift, at the time of agreement to purchase said property and at the time he issued said draft, had no knowledge of said lien, and that at the time said Bank of Guntersville purchased said bill of lading the said bank had no knowledge of said lien; but said Gibson knew of the existence of said rent debt and the lien therefor on said bale of cotton. That subsequent to the 4th day of April, 1906, the said Bank of Guntersville, through its agents and correspondents, presented said draft, with said bill of lading attached, to the Jones Cotton Company at Decatur, Ala., for acceptance, and that the said Jones Cotton Company accepted the same, as is shown by indorsements on the face of the draft. That at the time said Jones Cotton Company accepted said draft they had no knowledge of the existence of the debt and lien of said Capehart. That the said draft, with bill of lading attached, was presented to the said Jones Cotton Company for payment, they declined to pay the same, and the same has never been paid by them. It is further agreed that said Capehart recovered and took possession of said bale of cotton prior to this suit under his landlord's lien. It is further agreed that the legal title of said bill of lading and draft was in the Bank of Guntersville at the time of the bringing of this suit, and that they have been the legal owners of said bill of lading and draft since the 4th day of April, 1906, on the day the same was purchased by them and delivered to them."

The draft is as follows:

"$56.08 4/4/06.

"At sight pay to the order of A. B. Gibson fifty-six and $^{08}/_{100}$ dollars, value received, and charge to account of one bale of cotton, bill of lading attached.

"M. T. Swift.

"To Jones Cotton Company, Decatur, Ala."

Written across the face of the draft is the following: "Accepted, payable April 9, 1906. Jones Cotton Company, per N. R. Mason." On the back of the draft is the following indorsement: "A. B. Gibson." The bill of lading was in the usual form and was indorsed: "A. B. Gibson."

Digitized by Google

D. C. Almon and Lowe & Tidwell, for appellant. Callahan & Harris, for appellee.

DOWDELL, J. There can be no doubt that the instrument sued on is governed by the commercial law. Anderson & Co. v. Jones, 102 Ala. 537, 14 So. 871, and authorities cited in that case. The facts in this case are essentially different from the facts in the case of Haas & Co. v. Citizens' Bank of Dyersburg, 144 Ala. 562, 39 So. 129, 1 L. R. A. (N. S.) 242, 113 Am. St. Rep. 61, relied on by appellee. There was no retention of title to the property by the vendor in the case before us. The bank discounting the draft sued on was in no sense the vendor of the bale of cotton forming the consideration of the draft drawn by M. T. Swift on the defendant in favor of the payee, Gibson. When Swift bought the bale of cotton from Gibson, and instructed him to ship it to the Jones Cotton Company, the delivery of the cotton to the common carrier by Gibson, consigned to the Jones Cotton Company in pursuance of Swift's instructions, divested the title out of Gibson. The indorsement by Gibson of the draft, with bill of lading attached, did not operate to put the legal title to the bale of cotton in the plaintiff; nor did it, as said above, constitute the plaintiff the vendor of the cotton. The plaintiff became the owner of the draft before its maturity, in the ordinary course of business, and consequently the drawee and acceptor cannot be heard to set up the defense of failure or want of consideration.

The case was tried by the court below without the intervention of a jury, and upon an agreed statement of facts. This court is authorized, by an act regulating the practice, etc., in the Circuit Court of Morgan county (Acts 1894–95, p. 586), to review the conclusion and judgment of the lower court in such cases on the evidence, without any presumption in favor of the rulings of the lower court, and in case of error to render such judgment here as the lower court should have rendered. From what we have said above as to the law of the case, it follows that on the agreed statement of facts the judgment appealed from must be reversed, and one will be here rendered in favor of the plaintiff.

Reversed and rendered.

TYSON, C. J., and SIMPSON and McCLELLAN, JJ., concur.

Decision No. 1115.

ANDREWS et al. v. NORTHWESTERN NAT. BANK.

(Supreme Court of Minnesota. August 28, 1908.)

117 N. W. 621.

BANKS AND BANKING — PAYMENT OF FORGED PAPER — BANK'S LIABILITY.

The appellants forwarded to their agent a check to be used in paying their debt to a customer. The agent forged the name of the payee, and deposited the check in a bank to his own credit. Being short in his account with his principals, the

Digitized by Google

agent then paid to them a sum of money which included the proceeds of the forged check. The bank on which the check was drawn paid it on the forged indorsement. In an action by the drawers of the check against the bank, held, that inasmuch as the proceeds of the check came back to the drawers, and the debt of the agent remained unpaid, they had suffered no damage by reason of the payment of the check, and could not recover the amount thereof from the bank.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; David F. Simpson, Judge.

Action by Arthur C. Andrews and another against the Northwestern National Bank. Judgment for defendant, and plaintiffs appeal. Affirmed.

Durment & Moore, for appellants. Koon, Whelan & Bennett and Lancaster & McGee, for respondent.

ELLIOTT, J. This action was brought by Andrews & Gage, the appellants, against the Northwestern National Bank to recover the sum of $926.72 which the bank charged against their account because of the cashing of a check upon which the name of the payee was forged.

The parties stipulated, and the court found, in substance: That Andrews & Gage were engaged in the grain and grain elevator business in the State of Minnesota, and during the time covered by the transaction in question operated an elevator for the purchase, handling, and storage of grain at Berlin, N. D. That during said time and until about the 27th day of October, 1905, one P. T. Langdon was an employee and agent of Andrews & Gage at Berlin in charge of their elevators there, and as such employee and agent engaged in purchasing, storing, and shipping wheat and other grain in Berlin. That Langdon had power and authority from Andrews & Gage to purchase wheat and other grain from the farmers in the vicinity of Berlin, and to store it in the elevators and ship it to Andrews & Gage at Minneapolis and other markets, and pay for or make advances on the grain so purchased with money furnished by Andrews & Gage for that purpose, or by delivering to the vendor of such grain the checks of Andrews & Gage furnished to him by them for that purpose. But he had no authority to sign or indorse any check made by, or on behalf of, Andrews & Gage, nor to indorse any draft made by or upon them, or to sign drafts on their behalf in the course of the business or otherwise. On or about September 23, 1905, Andrews & Gage made a certain check for $926.72, payable to Z. W. Thomas or order. This check was drawn upon the Northwestern National Bank at Minneapolis, and was mailed by Andrews & Gage to Langdon at Berlin, N. D., with instructions to deliver it to Z. W. Thomas if it was then due and owing to him for grain theretofore received by Andrews & Gage from him. Langdon received the check with the instructions, but, instead of delivering the check to Thomas, he, without the knowledge or consent of Andrews & Gage, on October 6, 1905, presented it to the State Bank at Berlin, N. D. Before such presentation, Langdon, without any authority, indorsed the name of Z. W. Thomas on the back of the check. At the request of Langdon, the State Bank

Digitized by Google

of Berlin then placed the amount of the check to the credit of an account then opened by Langdon in that bank in the name of P. T. Langdon & Co. The State Bank of Berlin took the check, and credited the amount thereof to P. T. Langdon under the name of P. T. Langdon & Co. There was no firm or partnership or corporation of that name, and the name was assumed by Langdon for the purpose of that account only. Thereafter, on October 17, 1905, Langdon deposited the further sum of $380.25 in the account. No other deposits were made to the credit of that account. Thomas never received any of the proceeds of the check.

The State Bank of Berlin after receiving the check indorsed the same, "Pay any bank or banker or order, prior indorsements guaranteed, State Bank of Berlin, Berlin, North Dakota, F. F. McGuire, Cashier," and delivered it to the First National Bank of Crystal Lake, Minn., and received from the bank either in cash or credit the amount of the check. That bank delivered the check to the National Citizens' Bank of Mankato with a similar indorsement, except the words, "Prior indorsements guaranteed," and received from it the amount of the check either in cash or credit. The National Citizens' Bank of Mankato delivered the check to the First National Bank of Minneapolis with a similar indorsement, and received from it the amount of the check in cash or credit. The First National Bank of Minneapolis presented the check for payment to the Minneapolis Clearing House on October 9, 1905, and the Northwestern National Bank received the check through the clearing house in the usual method, and paid to the First National Bank of Minneapolis the amount thereof either in cash of in credit, and charged the amount of the check upon its books to the account of Andrews & Gage. The State Bank of Berlin on October 6, 1905, received the check, supposing and believing that the indorsement thereon was a valid and proper one, and neither the First National Bank of Lake Crystal, the National Citizens' Bank of Mankato, the First National Bank of Minneapolis, nor the respondent, the Northwestern National Bank, had any knowledge that the first indorsement on the check was not genuine, valid, and proper until on or about May 17, 1906. Each and all of these banks received, accepted, and paid the check in the ordinary and usual course of business, and without any knowledge that the indorsement of the name of Thomas was not genuine and properly authorized. The State Bank of Berlin learned that it was not the genuine indorsement of Thomas on or about October 27, 1905. The account opened with the State Bank of Berlin by P. T. Langdon in the name of P. T. Langdon & Co. was not opened under the direction or with the knowledge of Andrews & Gage.

On October 27, 1905, Andrews & Gage demanded of Langdon certain moneys which they asserted he should account for. He thereupon informed them that it was in the bank to their credit, except about $79, which he then paid, and handed to them a bank pass book of the State Bank of Berlin in their name, showing that Andrews & Gage had to their credit in that bank the sum of $1,003.01. The fact was that, although not then known to Andrews & Gage, Langdon had on the same day drawn a check for $1,003.01 on the P. T. Langdon & Co. account, and had it credited to the account of Andrews & Gage in said bank and charged against the account of P. T. Lang-

Digitized by Google

don & Co. When Andrews & Gage received this bank book showing that they had a credit of $1,003.01 at the State Bank of Berlin, they were not aware that it was to any extent the proceeds of the Thomas check. On November the 9th Langdon withdrew the balance left to the account of P. T. Langdon & Co. from the State Bank of Berlin. After receiving the bank book, Andrews & Gage made other deposits in the account so opened in their name by Langdon, and prior to January 1, 1906, checked out of said account all the moneys so deposited by them and by Langdon. The check of $1,003.01 was given by Langdon to Andrews & Gage in settlement of a shortage known on October 27, 1905, and for no other purpose and upon no other consideration. Shortly prior to October 27, 1905, Andrews & Gage were informed by Thomas that he had not received the check in question, and had not indorsed the same. At that time they had the check with all the indorsements thereon in their possession. Prior to the delivery of the bank pass book to Andrews & Gage, Langdon stated to them that he was the agent of Thomas, and had authority to indorse the check. The sum of $1,003.01 owed by Langdon to Andrews & Gage was in addition to, and exclusive of, any liability on his part to the firm for said check or the money received from it.

Upon these facts the trial court found that Andrews & Gage were not entitled to recover the amount of the check from the Northwestern National Bank, and the correctness of this conclusion is the only question involved upon this appeal.

The facts present a rather unusual condition of affairs, but we are satisfied that the court reached the proper conclusions. The appellants contend that as depositors they were creditors of the Northwestern National Bank to the extent of their balance therein, and entitled to desregard any charge made against their account which was not authorized by them or made by reason of their negligence or other misconduct. The correctness of this general proposition cannot be questioned, but nevertheless Andrews & Gage are not in a position to require the Northwestern National Bank to credit their account with the amount of this check. The appellants make an ingenious argument, but the result which they desire to bring about would be so unjust and inequitable as to suggest that a fallacy lurks somewhere in the process of reasoning. The appellants have not been injured by the fact that the Northwestern National Bank paid this check upon a forged instrument, and their theory, if accepted, would merely result in substituting the bank for the defaulting employee as the creditor of Andrews & Gage. The check for $926.72 came into Langdon's hands on October 26, 1905, and with it he opened an account with the State Bank of Berlin in the name of P. T. Langdon & Co. Ten days later he deposited an additional sum of $380.25 in the account, making a total of $1,301.97. On October 27, 1905, he drew a check on the account of P. T. Langdon & Co. for the sum of $1,003.01, and deposited it in another account in the same bank in the name of Andrews & Gage. The result of all this juggling was that the $926.72, the proceeds of the check with the forged indorsement, and an additional $76.29 from some other source, went into the new Andrews & Gage account. Langdon was then short in his accounts with his employers, Andrews & Gage, and when on October 27, 1905, they made a demand on him for a settlement, he responded

Digitized by Google

by turning over to them the account in the State Bank of Berlin which he had evidently created for that purpose. That is, Langdon was short in his accounts, and had no money with which to pay. The check for $926.72 which was delivered to him by Andrews & Gage to be used in paying Thomas was in effect cashed by him. With the proceeds which still belonged to Andrews & Gage or to the Northwestern National Bank, Langdon assumed to pay his debt to Andrews & Gage. It does not appear that at that time Thomas was entitled to the check, and it was sent to Langdon for delivery to Thomas upon certain conditions. If Langdon had forged the indorsement and himself presented the check to the Northwestern National Bank and secured the cash, carried it to the office of Andrews & Gage, and handed it to them in settlement of his shortage, the situation in legal effect would have been identically the same as at present. Andrews & Gage could have put the money in the bank. They would have had Thomas' wheat, and still owed him for the same. The forged check would have been where it now is, Langdon would still have been short in his accounts, and the net result of the entire transaction would have been the liability of Langdon for prosecution for forgery.

We cannot see that the fact that this business was transacted by the use of credits, instead of the handling of actual cash, makes any difference so far as the liability of the Northwestern National Bank is concerned. It paid the check upon a forged indorsement, and thereby became liable to its depositor for any damages thereby sustained by him. If the depositor lost nothing, he should recover nothing. If a forged check for $100 on B.'s account is paid to A., and A. immediately on being caught hands the money back to B., it would not be claimed that B. could sue the bank and recover the $100 which had been wrongfully charged to his account. Again, suppose A. in the employ of B. owes B. $100 which B. cannot collect. A. is given a check on the bank payable to D., with instructions to deliver it to D. Instead of doing so, he forges the payee's name, draws the money from the bank, and with it pays his debt to B., and receives a receipt in full. Can B. collect $100 from the bank? If so, it would be quite easy for A. and B. to arrange for the bank to pay A.'s debt to B., leaving B.'s account unimpaired. Of course, A. might take some chances of criminal prosecution, but Langdon was willing to assume the chances in this instance in order to square his account with his employers.

The result of the entire transaction is that the money started with Andrews & Gage, and, after passing around the circle, came back to them. The fact that credits, instead of cash were used, does not change the legal effect. Langdon's debt to them is to that effect unpaid. There is nothing in this record which shows that the appellants were damaged; and the order of the trial court is therefor affirmed.

LEWIS, J. The mere fact that appellants received the proceeds of the check from Langdon would not prevent recovery. If appellants had been misled and had lost an opportunity to otherwise collect their claim from Langdon, then in my judgment the defense here urged would not be tenable.

Digitized by Google

But I concur in the view that appellants cannot recover unless they were damaged as a result of the transaction, and that no damage has been shown. Although the court found that appellants had no knowledge or information that the money received from Langdon was to any extent the proceeds of the check, yet the court also found that they had the check with all the indorsements in their possession, and knew that Thomas had never received it, and had not indorsed it, and that Langdon had indorsed it, claiming to be the agent of Thomas. It seems reasonably clear that appellants were in possession of all of the facts, and could readily have ascertained by an examination of the bank book that the money paid them by Langdon was the proceeds of the check. If appellants knew that Langdon had forged Thomas' name, and had drawn the money on the check from the local bank, they had every reason for believing that the money placed to their account in the pass book was that identical money. In receiving the money thus paid out by the local bank, appellants ratified the indorsement, and consented to its collection from the bank upon which the check was drawn.

I concur in the result.

Decision No. 1116.

DAVENPORT v. NATIONAL BANK OF COMMERCE IN NEW YORK.

(Supreme Court, Appellate Division, Second Department. June 18, 1908.)

112 N. Y. Supp. 291.

BANKS AND BANKING — CLEARING HOUSE BANKS — LIABILITIES.

1. The rule of a clearing house provides that arrangements between members of the association and non-members shall not be discontinued without previous notice, which shall not take effect until completion of the clearances of the day following the receipt of the notice. A member agreed to clear for a non-member. The contract between them made the rules of the clearing house a part thereof, and the non-member deposited with the membr cash and bills receivable as security, and authorized the member to use the deposit to pay checks redeemed by it. The non-member bank was solvent when the contract was made. Depositors of the non-member drew checks on it with knowledge of its insolvency, which the member paid, with knowledge that the superintendent of banks had taken possession of the non-member the day before. Held, that the member was entitled to dispose of the bills receivable to reimburse itself for the checks paid.

2. A member of a clearing house holding bill receivable, deposited by a non-member under an agreement requiring the member to clear for the non-member, is entitled to expenses incurred, including counsel fees in collecting the bills receivable, to reimburse itself for paying checks drawn on the non-member.

3. A member of a clearing house paying checks drawn on a non-member, pursuant to an agreement to clear the non-member, is entitled to recover protest fees in protesting the checks paid by it, when such protest was made pursuant to the request of the superintendent of banks who had taken possession of the non-member as an insolvent bank, though such protest was unnecessary.

Digitized by Google

Appeal from Trial Term, Richmond County.

Action by John S. Davenport, as receiver of the Bank of Staten Island, against the National Bank of Commerce in New York. From a judgment for defendant and an order granting an extra allowance additional to costs, plaintiff appeals. Affirmed on the opinion of Hon. Alton B. Parker, referee.

The following is the opinion of Alton B. Parker, referee:

The Bank of Staten Island on the 31st day of December, 1903, was insolvent, and during the forenoon of that day it was taken possession of by the superintendent of banks. The business day following the defendant, a member of the clearing house association, paid checks drawn upon the Bank of Staten Island amounting to something like $102,000. It had on hand a little over $11,000 of the money of the Bank of Staten Island, and held for its protection bills receivable belonging to that bank of the face value of something over $228,000. Subsequently it sold or collected enough of the bills receivable to reimburse itself, and the securities remaining, together with the surplus of moneys in its hands amounting to something over $6,000, were turned over to the receiver of the Bank of Staten Island. It is to recover the value of the securities thus converted into cash by the defendant, and the cash on hand which it retained for reimbursement on account of the checks drawn on the Bank of Staten Island, that this action is brought. There is no controversy as to the good faith of the defendant in all these transactions. There is no claim that any of its officers in collusion with certain depositors sought to benefit them at the expense of the other depositors of the Bank of Staten Island, or that in any way it acted otherwise than it deemed to be its right and duty under the contract which existed between it, the Bank of Staten Island, and the clearing house association. Unfortunately it did happen that certain depositors having deposits aggregating about $70,000 were enabled, through the shrewdness of one who early obtained information of the insolvency of the bank, to secure their deposits — a result most inequitable, and therefore one to be deplored. The device adopted was a very simple one. Each depositor acting under the advice of the one who knew the situation drew a check which was intended to cover about the amount of his deposit. These checks were deposited with the Stapleton National Bank on the day that the receiver took possession of the Bank of Staten Island, and the following business morning they were presented by the correspondent of the Stapleton National Bank, namely, the National Park Bank, which bank presented them at the clearing house at its opening, where in due course, according to the regular method of business, they were presented to and paid by this defendant. Other banks in precisely the same way and at the same time presented at the clearing house checks which they had received drawn upon the Bank of Staten Island, which, so far as the record discloses, were drawn by depositors in the usual course and without any knowledge of the fact that the bank was insolvent or that the superintendent of banks had taken possession.

The plaintiff contends that the defendant ought not to have paid any of the checks that were presented to it that its officers had knowledge of he taking of possession by the superintendent of banks the

Digitized by Google

day before. Hence it paid with knowledge that thereby the drawers of the checks would obtain a preference over other depositors, and that the preference so obtained would be upheld by the courts. O'Brien v. East River Bridge Co., 161 N. Y. 539, 56 N. E. 74, 48 L. R. A. 122. So far as the defendant was concerned, it had in fact no choice. It was a member of the clearing house association. As such, it had bound itself to pay all checks of the Bank of Staten Island, or any other nonmember bank for which it cleared, until after the exchanges of the morning following a notice that it would not longer clear for such bank.

The constitution of the New York Clearing House Association, together with its rules and regulations, constitute an agreement between the 54 member banks which make up the association, by which all are bound. Section 25 of the constitution provides that "whenever exchanges shall have been made at the clearing house by previous arrangements between members of the association through one of their number, and banks in the city and vicinity, who are not members, the receiving bank at the clearing house shall in no case discontinue the arrangement without giving previous notice, which notice shall not take effect until the exchanges of the morning following the receipt of such notice shall have been completed." The clearing house association rules, following the command of the constitution, provide that any member of the association sending through the clearing house the exchanges of any bank or banks not members "shall be liable in the premises, the same as for its own transactions, and its liability in all such cases shall continue until after the completion of the exchanges on the morning next following the receipt of notice of discontinuance of any such agency." By an amendment to the clearing house rules adopted May 23, 1896, it was provided "that the liabilities of banks in the clearing house doing business for banks in the vicinity are under the amendment to the constitution passed April 26, 1865, the same as for their own transactions." The defendant, as soon as it received the information on December 31, 1903, that the superintendent of banks had taken possession of the Bank of Staten Island, gave notice to the members of the association in the manner provided by its rules and regulations of the discontinuance of the arrangement of clearing for such bank. Such notice, however, could not take effect until the completion of the exchanges on the morning of the first business day following. There is no pretense that the defendant had any suspicion of the condition of the Bank of Staten Island prior to its being informed that the superintendent of banks had taken possession. It gave the notice, therefore, as soon as it possibly could, which was after learning that the bank it was representing was in trouble. And it had no more right, in view of its engagements with its associate members in the clearing house association to refuse to pay checks presented in the clearing house on the morning following the giving of the notice, than it had to refuse to pay checks drawn upon it by its depositors. In paying the checks, therefore, it did only what it was bound to do and could be compelled to do. It did, however, seek to minimize the number of checks it would be obliged to redeem the following business day by requesting members of the association not to accept checks drawn on the Bank of Staten Island. More, it could not do.

Digitized by Google

But, it is said, if its engagements with its associate members in the clearing house association compelled it to pay the checks of the Bank of Staten Island, that was its misfortune that its agreement with its co-members to pay such checks gave it no further or other right against the Bank of Staten Island than any other creditor had. That would, of course, be true, were it not for the existence of a contract which it had with the bank, by the terms of which it held for its protection bills receivable of the value of twice the amount paid by it in redeeming the Bank of Staten Island checks — a contract entered into by both parties, not only with knowledge of the constitution and rules of the clearing house association, but also under such circumstances as to make such constitution and rules a part of the contract, and the clearing house association a party thereto. The Bank of Staten Island by the making of the agreement, becoming what is known as a nonmember bank, was compelled to pay, as were the 45 other nonmember banks, a fee for the privilege of being cleared for by member banks. Nonmember banks, as well as member banks, made weekly statements to the clearing house. These statements are tabulated and printed, and circulated among all the member and nonmember banks, and show the condition of each bank, its obligations, its legal reserves, and its general financial condition.

While the Western National Bank was acting as the clearing agent of the Bank of Staten Island in April, 1899, the board of directors of the latter bank adopted the following preamble and resolution: "Whereas this corporation has acquired the privilege of clearing and making exchanges of its checks through the New York Clearing House, and is subject to its rules and regulations: Now, therefore, be it resolved that this corporation in all respects assents to and agrees to be bound by and comply with the rules and regulations regarding collections outside the city of New York, which may be established pursuant to the constitution of said association, and that the president of this corporation is hereby instructed to file a certified copy of this resolution with the clearing house association as evidence of such assent and agreement on the part of this corporation." As the rules and regulations of the association by which it thus agreed to be bound in effect make a member bank which assumes to clear for another bank a practical guarantor for 24 hours of the bank which is being cleared for, it is the custom of all member banks to require nonmember banks for which they clear, to keep a certain amount of money on deposit for the purpose of paying checks drawn against it, and also to keep on deposit bills receivable or other collateral in an amount agreed upon sufficient to assure the member bank against either loss or delay. Such an agreement existed between this defendant and the Bank of Staten Island from October 3, 1903, down to and including all the occurrences which are the subject of this controversy. It had similar agreements with other banks from April, 1890, down to the date of the agreement with this defendant. The legal effect of those agreements, as well as the one under consideration, was to require the member bank clearing for said bank of Staten Island to pay all the checks drawn upon the latter when presented through the clearing house, until the completion of the exchanges of the morning following the giving of a notice that it would no longer

Digitized by Google

clear. On the other hand, the agreement in legal effect authorized the clearing bank to use the moneys deposited in pursuance of it to meet such checks, and, in addition, to collect or sell the bills receivable or other collateral when necessary to pay the checks redeemed by it that were in excess of the amount of moneys on deposit.

The agreement now under consideration was entered into at a time when the bank was solvent, and, when it deemed it of value to it, that this defendant should clear for it. To secure that advantage, it had the legal right to enter into the contract which it did make, a contract which authorized the defendant to make use of the bills receivable for its protection in the event that the Bank of Staten Island should fail to keep on deposit with the defendant sufficient moneys to pay any and all checks that under the rules of the association the defendant should be compelled to redeem. The defendant was compelled to redeem while that contract was in force checks amounting to about $102,000. Hence it had the right to use the cash on hand and the bills receivable to the extent necessary for its reimbursement. They were in legal effect collateral in its hands to secure the payment by the Bank of Staten Island of all the checks drawn upon it which the defendant should be obliged to redeem under the clearing house rules. Its right to employ them, as collateral is usually used, to satisfy the obligation they were intended to secure, seems to me unquestionable, though it were not the fact that there existed an arrangement between these two banks and the clearing house which constituted a tripartate agreement upon ample consideration for the mutual benefit of all the parties to it. Such, however, was the legal effect of the arrangement into which these parties entered. And so the Court of Appeals held in O'Brien v. Grant, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361, where similar relations and situations were carefully considered by that court. The learned counsel for the plaintiff insists that O'Brien v. Grant is not on all fours with this case, because in that one the superintendent had not taken possession. While there is that distinction between the two cases, the fact is that in that case the redeeming bank in the clearing house association, not only knew that insolvency was suspected, but also knew that the bank had closed its doors. But, as I understand the opinion, the decision was not rested upon any such distinction. Instead, the court held that the suspected insolvency of the nonmember bank did not excuse the member bank from the performance of its obligations to the clearing house bank, and hence the argeement under which it undertook to clear for a nonmember bank entitled it to hold and apply the securities which it held for its protection in payment of the amount so paid by it. The opinion of the court seems to me to indicate very clearly that the decision would not have been different had the member bank in that case known that the nonmember bank was insolvent, instead of suspecting it. The reasoning of the opinion which led to a decision which sustained the right of the member bank to do precisely what the member bank did in this case is not rested at all upon the certainty or uncertainty of the member bank as to the insolvency of the nonmember bank. Instead, it demonstrates that the agreement as made was not in violation of the state banking corporation law, or any other law; that it was such an agreement as the three parties to it were competent

Digitized by Google

to make; that its terms were unambiguous, and entitled the member bank to redeem the checks drawn upon the nonmember bank on the first business day following the giving of the notice, and to employ the collateral which it held to satisfy its claim for moneys paid out in the redemption of such checks. If, however, I am giving to the decision a broader construction than it is entitled to, it nevertheless seems to me clear that there is no opportunity for a distinction between the two cases. In that case the nonmember bank had closed its doors and the member bank knew it and suspected insolvency. In this case the superintendent took possession, and because of that fact the defendant's officers probably suspected insolvency. But they were not advised by the superintendent or by any one else prior to the redemption of the checks in question that the bank was insolvent. In both cases, therefore, there was of necessity a suspicion of insolvency, and nothing more. From every point of view, therefore, the two cases are in all material respects similar.

The plaintiff urges specifically that the contract was in effect one to continue redemption for 24 hours after the superintendent of banks should take possession, and for that reason void. It must be conceded that such has been its effect, not only in this case, but also in the O'Brien v. Grant case. But that was not the purpose of the contract, although it has proved to be an incident of it. Insolvency was not then anticipated by either bank. Had it been, the defendant certainly would not have entered into it. The plaintiff's position, then, comes at last to this: That the contract, sanctioned by the local precedents and customs covering many years, forbidden by no status, entered into in good faith and for mutual helpfulness, is void, and therefore nonenforceable, because it happens in the changed conditions resulting from unexpected insolvency that through it some depositors secure a preference. To state the proposition is to refute it. More than that, the proposition was necessarily involved, and therefore passed upon in O'Brien v. Grant. It seems to me to have been explicitly passed upon, although the proposition now presented was differently, and not so well, expressed as in this case.

It is further objected by the plaintiff that the Bank of Staten Island had not complied with all the provisions of the amendment to the clearing house rules adopted February 11, 1903. As I find the fact to be otherwise, there is no occasion for further consideration.

The claim that the defendant could have avoided redemption of the checks by signifying its intention to withdraw from the clearing house association, while not clearly demonstrated, may from my point of view be treated as if it were, without resulting in help to the plaintiff. The defendant could not take such step or any step in the direction of avoiding the contract to which the clearing house association was a party, without injury to it. It was not called upon to suffer any injury whatever. It was to save it from injury generally that the collateral was placed in its hands, and specifically to save it harmless because of checks redeemed, as these were, for the Bank of Staten Island through the clearing house, after completing the exchanges of the morning following the notice of discontinuance of the arrangement.

The defendant was obliged to employ counsel and incur other ex-

Digitized by Google

pense in collecting the bills receivable. The charges made for the services rendered were reasonable, and therefore should be allowed to the defendant. Bank of Staten Island v. Silvie, 89 App. Div. 467, 85 N. Y. Supp. 760; Field v. Sibley, 174 N. Y. 514, 66 N. E. 1108. The charge of the defendant for protest fees, incurred in protesting the checks redeemed by it, is not free from doubt. Had it taken such action of its own motion, clearly the charge could not be allowed, for protest was not necessary. But it did nothing of the kind. It did not even advise protest. It protested the checks because, and only because, the superintendent of banks requested it to do so. He was then in possession of the bank, and for the time being had authority to take the necessary steps to protect its assets. He chose as one step in that direction to protest the redeemed checks — a needless step, surely. But, in view of the fact that the direction came to the defendant, from one who represented all the power that the State had conferred for the purpose of temporarily protecting the assets of banks in trouble, it would seem as if services which he deemed necessary for such purpose should be paid for, although he was in fact mistaken as to the necessity of it.

The complaint should be dismissed.

Argued before WOODWARD, HOOKER, GAYNOR, RICH, and MILLER, JJ.

John S. Davenport, for appellant. John Quinn, for respondent.

PER CURIAM. Judgment and order affirmed, with costs, on the opinion of Hon. Alton B. Parker, referee.

Digitized by Google

Digitized by Google

Decision No. 1117.

SNYDER v. CORN EXCHANGE NATIONAL BANK.

(Supreme Court of Pennsylvania. June 2, 1908.)

70 Atl. 876.

BILLS AND NOTES — CHECKS PAYABLE TO BEARER — "FICTITIOUS PERSON" — BANKS AND BANKING — DEPOSITS — PAYMENT — ON FORGED INDORSEMENT — WRONGFUL PAYMENT.

1. Where the drawer of a check intended to use the name of payee, and did use it, as that of a person who should never receive the check nor have any right to it, such payee, though an existing person, was a fictitious one, within the Negotiable Instruments Act of May 16, 1901 (P. L. 194) making a check payable to bearer, if payable to the order of a fictitious or non-existing person, and such fact is known to the person making it so payable.

2. The liability of a bank to its depositors for payment of a check on a forged indorsement, does not protect a depositor who is in fault, as in intrusting a check to one he has reason to suppose would make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person.

3. That checks drawn by an agent on his principal's account were delivered in connection with gambling or wagering transactions is unavailing in an action against the bank, where there was no notice.

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by George E. Snyder, individually, and trading as Harrison, Snyder & Son, against the Corn Exchange National Bank to recover the amount of checks alleged to have been wrongfully paid by the bank. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William S. Divine and George S. Graham, for appellant. John Cromwell Bell and H. Gordon McCouch, for appellee.

BROWN, J. In determining whether the rule for judgment for want of a sufficient affidavit of defense was properly discharged by the court below, the following material averments in plaintiff's statement must be first considered: George E. Snyder, the plaintiff,

Digitized by Google

trading and doing business as a broker in the city of Philadelphia under the name of Harrison, Snyder & Son, was a depositor with the Corn Exchange National Bank, the defendant. He had in his employ a clerk named Edwin S. Greenfield, who was authorized to draw checks in his name against his deposit in the said bank for the special purposes stated in written power of attorney, lodged with the bank. His power of attorney was as follows:

"Know all men by these presents, that we, Harrison, Snyder & Son, do make, constitute, and appoint Edwin S. Greenfield our true and lawful attorney for us and in our name. (1) To draw checks against our account in the Corn Exchange National Bank. (2) To indorse notes, checks, drafts, or bills of exchange which may require indorsement for deposit as cash or for collection in said bank. (3) To indorse any paper we may offer said bank, for discount. (4) To accept all drafts or bills of exchange which may be drawn upon. (5) To make substitution in collateral loans, and to do all lawful acts requisite for effecting these premises; hereby ratifying and confirming all that the said attorney shall do herein by virtue of these presents: In witness whereof, we have hereunto set our hand and seal, this 19th day of February, in the year of our Lord, one thousand nine hundred and two (1902). Harrison, Snyder & Son.

"Signed, sealed, and delivered in the presence of C. Meyer, Jr."

Against plaintiff's deposit with the defendant Greenfield, as attorney aforesaid, drew four checks payable to the order of Charles Niemann, amounting in the aggregate to $18,387.50. The first, for $6,000, was drawn on April 18, 1906; the second, for $1,800, on April 27, 1906; the third, for $2,587.50, on May 1, 1906; and the fourth, for $8,000, on May 3, 1906. These checks were paid by the bank and charged to the account of the plaintiff. They purported to have been indorsed by the said Charles Niemann, but the indorsements of his name were forgeries, and were never authorized by him or the plaintiff. The said checks purported to have been indorsed in blank by said forged indorsements to the firm of R. M. Miner & Co., a copartnership, purporting to carry on a stock and grain brokerage business, based upon actual purchases, sales, and deliveries, but actually conducting a gambling establishment, popularly known as a "bucket shop." The said four checks were deposited by the said R. M. Miner & Co., with the Real Estate Title Insurance & Trust Company of Philadelphia, which acted as a bank of deposit for the said R. M. Miner & Co. The said trust company indorsed three of the said checks, guaranteeing the previous indorsements to certain banks in the city of Philadelphia for collection, through which they were collected. The fourth check was also indorsed by the said trust company, but without guaranteeing the previous indorsements. The defendant, the Corn Echange National Bank, relying upon the guaranty by the Real Estate Title Insurance & Trust Company of the indorsements upon the three checks, and upon its indorsement of the fourth, paid each of said checks to it through its collecting agents. Upon the averments that the indorsements purporting to be those of Charles Niemann were forgeries, that the Real Estate Title Insurance & Trust Company collected the proceeds of the checks with actual knowledge of the character of the business of the firm of R. M. Miner & Co., that the defendant

Digitized by Google

had constructive notice of the business of said firm, and that the said checks were not given in due course of business, the plaintiff claims to recover from the appellee the amounts it paid on them.

Turning to the affidavits of defense, we find the following averred by the defendant: The plaintiff had in his employ as his confidential clerk and manager Edwin S. Greenfield, to whom he largely intrusted the conduct and management of his business, particularly that portion of it relating to the finances, and the said clerk or manager had by virtue of the power of attorney of February 19, 1902, drawn many checks upon the defendant, amounting in the aggregate to many thousand dollars, which checks had been paid by the defendant on presentation, and no payment had ever been questioned by the plaintiff. Greenfield, after having drawn to the order of Niemann the four checks set forth in plaintiff's statement, delivered them to R. M. Miner & Co., in the regular course of business in payment of accounts due to the said firm, R. M. Miner & Co., after indorsing the said checks, deposited them with the Real Estate Title Insurance & Trust Company in the regular course of business, and the same were paid to the said trust company through the agencies set forth in plaintiff's statement. At the time each of the checks was drawn by Greenfield, there were no business transactions pending between the plaintiff and Charles Niemann, and there were not due to him the amounts of said checks or any other sum or sums of money whatever. When Greenfield drew the said checks and forthwith delivered them to R. M. Miner & Co., he intended to cheat and defraud the plaintiff to the extent of $18,387.50 by having the checks paid to the said firm. He intended to write, and actually did write, the name of the said Charles Niemann on the back of the said checks in order to induce R. M. Miner & Co., and all others to whom they might be presented, to accept them as if they had been issued by the plaintiff to the said Charles Niemann in the regular course of business, and had been indorsed by him, the payee named in them. When Greenfield, as attorney for the plaintiff, drew the checks to the order of Niemann, he well knew that the latter had no right to them, or any of them, and it was never intended by Greenfield that Niemann should receive them or the proceeds thereof. Niemann was not a real bona fide payee, but was in legal contemplation a fictitious person, a fact well known to Greenfield at the time the checks were drawn. Said checks thereupon became payable to bearer, and the defendant is in no manner affected by the forged indorsements of Niemann's name thereon. Neither R. M. Miner & Co., the said Real Estate Title Insurance & Trust Company, nor its collecting agents had any notice or knowledge of any kind of the fraud of Greenfield until long after the checks had been paid by the defendant in due course in the regular order or business, and the said trust company had no knowledge of the character of the business of R. M. Miner & Co., as set forth in plaintiff's statement, if such was the fact, and that the checks represented gambling transactions. It is to be noted that, though the averment in plaintiff's statement is that Greenfield was authorized to draw checks "for the special purposes" stated in the power of attorney, no special purposes are therein named. His authority to draw checks was a general and unlimited one and, upon the presenta-

Digitized by Google

tion of any checks drawn by him as attorney for the appellant, the bank was under no duty to ascertain the purpose for which it had been drawn. It was as safe in paying any checks drawn by him as attorney for the plaintiff as it would have been if the check had been drawn by the plaintiff himself. By conferring this general power upon Greenfield, the appellant made it possible for him to abuse it, and, having been abused by him, the principal now asks that another, the bank which innocently paid the checks, and not he, shall bear the consequences of the fraud of the agent whom he trusted. This result cannot follow unless in the face of the facts as set forth in the affidavit of defense, which for the present we must assume to be true, the appellee paid the checks and charged them to the appellant's account in disregard of a duty which it owed him.

Greenfield had admittedly been authorized to draw checks payable to bearer. A check so drawn and delivered by him to any one could have been indorsed by the holder to another, and the payment of it by the bank to the indorsee could not have been questioned by the appellant. If, instead of drawing the four checks to the order of Niemann, he had made them payable to bearer and gone to the bank and drawn the money himself, the appellant could not have repudiated the bank's payment to him; or, if having made them payable to bearer he had delivered them to R. M. Miner & Co., and they had been indorsed by that firm to the Real Estate Title Insurance & Trust Company, and collected by it through the agencies set forth in plaintiff's statement, it would have been idle for the appellant to challenge the payments by the appellee in the face of his power of attorney clothing his clerk with unlimited power in drawing checks in his name and logded by himself with the bank as its authority to pay any checks drawn by virtue of it. Greenfield was responsible to his employer for the abuse of the power conferred upon him, and the employer's concern was that it should not be abused; but it was never any concern of the bank why, or for what purpose, any check had been drawn by the clerk under the broad power given him by the employer. Its sole duty was to pay without question whenever a check so drawn was presented by the party to whom Greenfield intended it to be paid, and his intention every time he drew a check became, as to the bank upon which it was drawn, the intention of the man who had empowered him to draw it.

By our Negotiable Instruments Act of May 16, 1901, (P. L. 194), a check is payable to bearer "when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable." The averment in the affidavit of defense is that Niemann was not a real, bona fide payee, but was in legal contemplation a fictitious person, such fact having been well known to Greenfield at the time he drew the checks; that Niemann had no right to them, or any of them, and it never was intended by Greenfield that he should receive them or their proceeds. Niemann may have been an existing person, but he could have been, and was, a fictitious one within the meaning of the act of assembly, if Greenfield intended to use his name, and did use it, as that of a person who should never receive the checks nor have any right to them. The intent of the drawer of the check in inserting the name

Digitized by Google

of a payee is the sole test of whether the payee is a fictitious person, and the intent of the drawer of these checks as attorney for the appellant must, as just stated, be regarded as against the bank upon which they were drawn as the intent of the appellant himself. A fictitious person within the contemplation of the Act of 1901, is not merely a nonexisting one; for, if so, the word "nonexisting" would have been sufficient without more. It is clear, then, that, when the legislature declared that a check payable to a "fictitious of nonexisting person" is to be regarded as payable to bearer, it meant a fictitious person to be one who, though named as payee in a check, has no right to it, or the proceeds of it, because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed.

In Bank of England v. Vagliano, L. R. Appeal Cases (1891) 107, the English Bills of Exchange Act of 1882, after which our Act of 1901 was modeled, was construed, and, in answering the contention that the word "fictitious" was only applicable to a creature of imagination, having no legal existence, Lord Herschell said: "If so, there was no nesessity for the introduction of the word 'fictitious' in the enactment. The word 'nonexistent' would have sufficed . . . Where, then, the payee named is so named by way of pretense only without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. It do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence." Lord Morris, following, said: "I entirely agree in the conclusion arrived at by my noble and learned friend, Lord Herschell, viz., that, whenever the name inserted as that of the payee is inserted without any intention that payment shall only be made in conformity therewith, the payee becomes a ficititious person within the meaning of the Bills of Exchange Act, 1882, § 7, subsec. 3, and that the bill may be treated by a legal holder a payable to bearer; and, having had the advantage of reading the noble and learned lord's judgment in print, I concur in the reasoning by which that conclusion is arrived at." In this Lord Watson concurred, saying: "I think that the language of the subsection taken in its ordinary significance imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either nonexisting, or, being in existence, has not, and never was intended to have, any right to its contents."

In Phillips v. Mercantile National Bank of New York, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, a case singularly similar to the one now before us, the New York Court of Appeals, in construing the word "fictitious" in a statute of that State containing the same provision as ours, attached to it the same meaning as is given to it in Vagliano v. Bank of Enkland. Bartlett, the cashier of the National Bank of Sumter, S. C., had authority from it tc draw checks or drafts upon the Mercantile National Bank of New York, with which it had an account. He drew checks upon that bank, making them payable to the order of existing persons, but without their knowledge, and then indorsed the checks in their names to a firm of stockholders in New York, who collected them from the

Digitized by Google

Mercantile National Bank. The receiver of the Sumter bank brought suit against that bank to recover back the amounts which it had paid on Bartlett's checks, on the ground that the indorsements of the names of the payees were forgeries. It was held that there could be no recovery because the checks had been made payable to fictitious persons, even though the names adopted were those of known and existing ones, and were therefore to be regarded as having been made payable to bearer and intended for deilivery to the stockbrokers in New York. This having been the intent Bartlett, who had authority from his bank to draw the checks, his intent was said to have been, so far as the New York bank was concerned, the intent of his bank, and that whatever he did in drawing and delivering the checks was to be regarded as its act. In the course of its opinion the court said: "Whether indorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant. Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310. In the case cited a bill was drawn upon the plaintiff to the order of one Truman Billings, and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings, a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. Bronson, J., said: 'As the payee had no interest and it was not intended he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity, and it is fully settled that when a man draws and puts into circulation a bill, which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer.' The case of Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, . . . was a case wholly other than was made out here. It was stated in the Shipman case that the maker's intention is the controlling consideration, which determines the character of the paper, and that the statutory rule which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that by the methods resorted to he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon them. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. . . . The fictitiousness of the maker's direction to pay does not depend upon

Digitized by Google

the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office, and the powers confided to him for exercise, was enabled to perpetrate a fraud upon his bank, which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence, and gift of powers, made them possible, and not upon others, who themselves acting innocently and in good faith were warranted in believing the transaction to have been one coming within the cashier's powers. It may be quite true that the cashier was not the agent of the bank to commit a forgery or any other fraud of such a nature, but he was authorized to draw or check upon the bank's funds. If he abused his authority and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them, made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity."

If the checks drawn by Greenfield to the order of Niemann as a fictitious person had been drawn by Snyder himself with the same intent as Greenfield's, and he had indorsed Niemann's name on them and handed them to R. M. Miner & Co., it would not be pretended that he would have any claim against the appellee. And yet this is the real situation; for, when Snyder lodged with the bank his power of attorney to Greenfield, he in effect said to it: "Any check drawn upon you by Greenfield as my attorney and issued by him is to be paid by you as having been drawn and issued by me." If this is not sufficient to protect the bank from liability for what the appellant now charges were its mispayments out of his funds, it is not easy to conceive what would be. The guaranty of the previous indorsements on the checks by the Real Estate Title Insurance & Trust Company was a guaranty of the indorsement of R. M. Miner & Co., for it was the only one upon the checks in legal contemplation when they were deposited with the trust company. When the checks were delivered to R. M. Miner & Co., they were, as shown, payable to bearer, and nothing, therefore, need be said on the contention of the appellant as to the liability of the trust company to the appelle upon the guaranty of the indorsements on the checks, unless it be to repeat what we have said through our Brother Fell in recognizing the liability of a bank to its depositor for payment of a check on a forged indorsement: "The rule applies where a check has been lost or stolen and the payee's name has afterwards been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one who he has reason to suppose will

Digitized by Google

make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank." Land Title & Trust Company v. Northwestern National Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717. The allegation that the checks were delivered to R. M. Miner & Co. in connection with gambling or wagering transactions is unaviling, in view of the averments in the affidavit of defense. Bank v. Arnold, 187 Pa. 356, 40 Atl. 794.

The assignment of error is overruled, and the order of the court discharging the rule for judgment is affirmed.

Decision No. 1118.

GILPIN v. SAVAGE.

(Supreme Court, Trial Term, Erie County. October 30, 1908.)

112 N. Y. S. 802.

BILLS AND NOTES — PRESENTMENT FOR PAYMENT — SUFFICIENCY OF PRESENTMENT — PLACE — PRESENTMENT BY TELEPHONE — EXHIBITION OF INSTRUMENT — PRESENTMENT AND DEMAND — WAIVER — WORDS AND PHRASES — "TELEPHONE" — SUFFICIENCY — RIGHTS ON TRANSFER — BONA FIDE PURCHASERS — PAYMENT OF PRE-EXISTING DEBT — ACTIONS — BURDEN OF PROOF — PAYMENT AFTER MATURITY — REQUISITES — CONSIDERATION — EVIDENCE.

1. Negotiable Instruments Law (Laws 1897, p. 736, c. 612), § 132, requires presentation for payment to be made at the proper place and to the person primarily liable. Section 133 (page 736) provides that the instrument is presented at the proper place when presented at the place of payment specified therein. Section 134 (page 737) requires the instrument to be exhibited to the person from whom payment is demanded. Section 142 (page 738) provides that presentment for payment is dispensed with by waiver of presentment, and section 144 (page 738) provides that, when an instrument is dishonored by non-payment, the holder has an immediate right of recourse to all parties secondarily liable. A note was made payable at the home of the maker on a certain street, and at maturity he was called up there by telephone and asked what he was going to do about it, and replied that he could not pay it, and was informed that the note would be protested. Held, that the demand over the telephone was a sufficient presentation for payment; the statutory right of the maker to the exhibition of the note being waived by his failure to insist thereon.

2. Under the Negotiable Instruments Law (Laws 1897, p. 737, c. 612), § 134, requiring the instrument to be exhibited to the one from whom payment is demanded, upon presentation and demand of payment of a note by one holding it for collection, the maker could insist on the exhibition of the note as evidence of the holder's right to collect.

3 The right of the maker of an instrument to require its exhibition on presentment for payment is personal, and may be waived by him; and if, on demand for payment, its exhibition is not requested, and the payor declines to pay on other grounds, the actual exhibition of the note will be deemed waived

Digitized by Google

4. A telephone is an instrument by which two persons may talk to each other.

5. Only a substantial compliance with the statute is requnired in making presentment of a note for payment; and, where there has been a substantial compliance, any omission to observe more technical rules will not be permitted to prejudice the indorser.

6. In an action on a note against an accommodation indorser, where the note was not paid at maturity, and the answer admitted the making of the note and defendant's indorsement, and the instrument was put in evidence, that it was transferred to plaintiff for a past indebtedness would not prevent a recovery, as the instrument itself was prima facie evidence of consideration sufficient to sustain the action, and plaintiff could recover, even if it had been transferred without any consideration.

7. Failure to pay a note at maturity, and its production by the holder, raises a presumption of continued nonpayment, and the burden is on defendant to overcome it.

8. A negotiable note is itself prima facie evidence of consideration, sufficient to sustain an action thereon by the holder.

Action by Richard S. Gilpin against William M. Savage. Judgment for plaintiff.

John M. Hull and Aaron Fybush, for plaintiff. John T. Ryan, for defendant.

WHEELER, J. This action is brought against the indorser of a promissory note made by his son, Walter Savage, and by its terms made payable at the residence of the maker, No. 507 Prospect avenue, in the city of Buffalo, N. Y. The note is held by the indorsee of the original payee, and was forwarded by him for collection to the Columbia National Bank of Buffalo. On the day of the maturity of the note a clerk in the employ of the bank called up the maker on the telephone. The maker responded to the call at his house. The clerk then stated to the maker that the bank held the note for collection, described it, and asked the maker what he proposed doing with it. The maker replied, in substance, that he could not pay it; that he had an understanding or agreement that the note should be renewed, and if the bank would return the note it would be taken care of at the other end of the line. The clerk replied that they knew nothing about such an arrangement, and then called to the telephone the assistant cashier of the bank, who in turn talked with the maker. The maker repeated in substance what had been said to the clerk, and was informed by the cashier that the bank would, under the circumstances, have to protest the note. No other presentation at No. 507 Prospect avenue was made; but the note was protested, and notice of the protest mailed to the indorser, this defendant.

The defendant contends that the necessary steps were not taken to charge him as indorser and that the failure to present the note at its place of payment discharged him from liability. The question is, therefore, fairly presented for determination whether the demand over the telephone was a sufficient presentation; and whether the bank was relieved of the obligation, under the facts, of actually going to the maker's house and making a further presentation and demand there. The researches of counsel and court are unable to discover any decided case directly in point. The case is novel in its features, and its

Digitized by Google

decision of importance both to the parties and to the banking community. As suggested, two lines of inquiry present themselves: First, was there a presentation at No. 507 Prospect avenue; and, if not, was its presentation excused, so as to still charge the indorser? Section 132 of the Negotiable Instruments Law (Laws 1897, p. 736, c. 612) provides that:

"Presentment for payment, to be sufficient, must be made: . . . (3) At a proper place as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made."

Section 133 provides that:

"Presentment for payment is made at the proper place: (1) Where a place of payment is specified in the instrument and it is there presented."

Section 134 provides:

"The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it."

Section 142 provides that:

"Presentment for payment is dispensed with: . . . By waiver of presentment, express or implied."

Section 144 provides that:

"Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder."

It was the evident purpose and intent of the framers of the statute to incorporate into the statute the provisions of the common law, although there follows the usual embarrassment which all codifiers encounter in framing a statute to meet all possible cases. Was the note in this case presented at No. 507 Prospect avenue, the place of payment named in the note, within the reasonable meaning of the statute? We think it was. At the time of the conversation between the maker and the bank officials over the telephone, the maker was actually at the place of payment. The talk was immediately between him and the holder of the note. For every purpose of demand and refusal it was just as effective as though the conversation had taken place between the parties when all were within the walls of the house itself. The maker knew perfectly well that a demand was then and there made upon him for the payment of the note in question, and he was then and there called upon to act. He did act, and treated it as a demand for payment, and declined to pay. He did not question the mode or manner of presentment, but declared his inability to meet the note, and made claim to some arrangement for its renewal. Of course, the maker had the right to have insisted on the exhibition of the note to him as evidence of the bank's authority to collect. That right was a right, however, personal to the maker, and by not demanding its production he waived it. If, on demand of payment, exhibition of commercial paper is not asked, and a party to whom demand is made declines to pay on other grounds, a mere formal presentation by actual exhibition of the paper will be considered waived. Daniel on Negotiable Instruments, § 654. Lockwood v. Crawford, 18 Conn. 361; King v. Crowell, 61 Me. 244, 14 Am. Rep. 560; Porter v. Thom, 40 App. Div. 34, 57 N. Y. Supp. 479, affirmed 167 N. Y. 584, 60 N. E. 1119.

Digitized by Google

It seems to the court that all the essentials of a good presentation were met. It was made on the day of the maturity of the note. The note was described to the maker, in a conversation with the maker at the place of payment. Payment was asked and declined. So far as the maker was concerned, all that he required was done. The indorser could not well demand more for his own actual protection. All that remains to the indorser is the purely technical ground of a failure to produce the note itself at the house, No. 507 Prospect avenue, which would have resulted in the same refusal of payment made over the telephone. The use of the modern invention of the telephone is recognized by the courts. Commericial transactions and conversations had over the telephone have been recognized as of the same binding force as where the parties talked face to face. Globe Printing Co. v. Stahl, 23 Mo. App. 451, 458; Wolfe v. Mo. Pacific R. R. Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; Rock Island & P. R. Co. v. Potter, 36 Ill. App. 590; Guest v. Hannibal & St. J. R. R. Co., 77 Mo. App. 258; Thompson & W. Co. v. Appleby, 5 Kan. App. 680, 48 Pac. 933; Murphy v. Jack, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590; Deering & Co. v. Shumpik, 67 Minn. 348, 69 N. W. 1088. The telephone is simply an instrument by which two persons may talk directly to each other. Suppose the holder of a note should call to the maker from across a street, as the maker stood in his doorway, and notify him that he had his note and ask payment. Would not such a demand be deemed in law a proper presentment, although the street separated the person holding the note and the actual place of payment? Can it make any substantial difference because the person holding the note happens to be some blocks away, provided he is able to reach the maker over the telephone and talk directly to him in that way? The law simply requires substantial compliance in reference to proper presentment, and will not strain to find grounds for releasing an indorser, where there has been such a substantial compliance, and any omission to observe the more technical rules does not work to the prejudice of the indorser.

Actual and formal presentation of notes has been held unnecessary to charge the indorser under many varying circumstances, as where the maker dies before maturity of the note and no representative of his estate has been appointed; (Daniel on Commercial Instruments, § 1111), or where the maker has absconded (Id., § 1125), or where the maker has removed from the State and taken up his domicile in another State or country (Id., § 1145; Foster v. Julian, 24 N. Y. 28, 80 Am. Dec. 320; Eaton v. McMahon, 42 Wis. 487; Whitely v. Allen, 56 Iowa, 224, 9 N. W. 190, 41 Am. Rep. 99; McGruder v. Bank of Washington, 9 Wheat. 598, 6 L. Ed. 170). It has been held a sufficient demand and refusal, to constitute a dishonor of a note, if the maker, on the day it is due, calls on the holder where the note is and declares his inability to pay, and desires the holder to give notice to the indorser. Gilbert v. Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329. Soo, too, in an action against an indorser, it appeared the holder met the maker of a note on the street, and was refused payment, making no objection to the place of demand, and the court said:

"If demand be made upon the maker elsewhere than the place appointed, and no objection be made at the time, it will be deemed a waiver of any future demand." King v. Crowell, 61 Me. 244, 14 Am. Rep. 560.

Digitized by Google

In the case of Tredick v. Wendell, 1 N. H. 80, the note was at the bank. The maker lived within a few rods of the bank, and a letter was sent him, stating the note was at the bank and requesting payment. Held a sufficient demand to charge the indorser. The weight of authority, therefore, seems to be that the law is not overexacting as to the mode or method of presentation, so long as an opportunity is given the maker to pay the note or refuse its payment. For these reasons, we think the presentation made in this case, although over the telephone, met the substantial requirements of the law.

It is contended by counsel for the defendant that the plaintiff in this case is not a bona fide holder for value; that the evidence discloses the note was transferred to him for a past indebtedness, and therefore he cannot recover. We see no force in that contention. The answer admits the making of the note, and that the defendant indorsed the paper for the accommodation of the maker. The remainder of the answer is in effect a general denial of all the other allegations of the complaint. Upon the trial, the note was produced and put in evidence. The instrument itself was prima facie evidence of consideration sufficient to sustain the plaintiff's case. Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424. Any failure to pay a note at maturity, and its production by the holder, raises a presumption of continuous non-payment, and the burden is on the defendant to overcome it. Dresser v. Mercantile Trust Co., 124 App. Div. 891, 108 N. Y. Supp. 577. The payee, under such circumstances, would have the right to recover, and the plaintiff, his indorsee, has exactly the same right. It is not necessary for the plaintiff, to entitle him to recover, to show himself a bona fide holder, for value. If the note had been transferred to him without consideration, he would nevertheless be entitled to judgment.

We therefore conclude the plaintiff is entitled to judgment. So ordered.

Decision No. 1119.

HADDOCK, BLANCHARD & CO., INC., v. HADDOCK.

(Court of Appeals of New York. September 29, 1908.)

85 N. E. 682.

BILLS AND NOTES — IRREGULAR "INDORSER" — STATUTES — LIABILITY OF INDORSER — COMPLAINT — SUFFICIENCY — EVIDENCE — PAROL EVIDENCE — ADMISSIBILITY — PARTIES — PRIMARY AND SECONDARY LIABILITY — ACCOMMODATION PARTY.

1. One who indorsers negotiable paper in blank before delivery to give credit to the acceptors or makers is an "indorser," within Negotiable Instruments Law (Laws 1897, p. 734, c. 612), § 113, defining an indorser as a person who places his signature on an instrument other than as maker, drawer, or acceptor.

2. Negotiable Instruments Law (Laws 1897, p. 734, c. 612), § 114, providing that a person not otherwise a party to an instrument, who places thereon his signature in blank before delivery, is liable as an indorser in accordance with prescribed rules. changes the rule that a person who puts his name on the back

Digitized by Google

of bills or notes before delivery is presumably a second indorser and not liable to the payee, and such an indorser is presumed to be liable in accordance with the express language of the statute.

3. A complaint on a note or bill, which does not allege a collateral agreement between the parties, whose names are on the instrument, seeking to recover against a person, except as provided by Negotiable Instruments Law (Laws 1897, p. 734, c. 612), § 114, is demurrable.

4 Where a note payable to a person other than the maker, or a bill payable to bearer or the order of the maker, is indorsed by a third person after acceptance and before delivery, the intention of the indorser is ambiguous, and parol evidence of the intention of the parties is admissible.

5. An acceptance of a bill makes the acceptor the principal debtor, and a bill, when accepted, becomes similar to a promissory note; the acceptor being the promisor, and the drawer standing in the relation of an indorser.

6. Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, within Negotiable Instruments Law (Laws 1897, p. 728, c. 612), § 55, defining an accommodation party, and also to determine which party to the instrument he accommodated.

7. Negotiable Instruments Law (Laws 1897, p. 734, c. 612), § 114, declaring that a person who signs for the accommodation of the payee is liable to all parties subsequent to the payee, etc., makes parol evidence necessary to establish whether the indorser signed the instrument for the accommodation of the payee, and the fact that the section does not state that, if the indorser sign for the accommodation of the acceptor, he is liable to all parties subsequent to the acceptor, does not preclude parol evidence to determine generally the questions relating to an accommodation party, as provided by section 55 (page 728), defining an accommodation party.

8. The maker of a bill, after acceptance, is an indorser, within Negotiable Instruments Law (Laws 1897, p. 735, c. 612), § 118, providing that, as respects one another, indorsers are liable prima facie in the order in which they indorse, etc., but that, as between the drawer of a bill and a third person indorsing it, parol evidence is admissible to determine the liability as between them.

9. Negotiable Instruments Law (Laws 1897, pp. 721, 734–737, 739, 743, c. 612), §§ 7, 114, 118, 130, 139, 140, 160, 186, declaring that in any case not provided for in the act the rules of the law merchant shall govern, determining the liability of a person placing his signature in blank to an instrument, providing for presentment of paper for payment, etc., enlarge rather than retrict the rules allowing parol evidence of the true liability and relation of the parties whose names appear on paper, in all actions between themselves.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Haddock, Blanchard & Co., Incorporated, against John C. Haddock. From a judgment of the Appellate Division (103 N. Y. Supp. 584), affirming a judgment for plaintiff, defendant appeals. affirmed.

M. Edward Kelley, for appellant. Israel T. Deyo, for respondent.

CHASE, J. The plaintiff is a foreign corporation authorized to do business in this State and engaged as a wholesale dealer in coal at Binghamton. The Plymouth Coal Company, a corporation, was engaged in the operation of coal mines in Pennsylvania prior to March, 1902, at which time it went into the hands of a receiver. The defend-

Digitized by Google

ant was the president and manager of said coal company and the owner of substantially all of its stock. The defendant was, until May, 1902, the president of the plaintiff, and during all the times herein mentioned had charge of plaintiff's New York office. At the time when the note and bills hereinafter mentioned were given the plaintiff was engaged in selling on commission at wholesale the coal mined by the Plymouth Company or its receiver, under a contract made with said coal company. One B., the vice-president of the plaintiff prior to May, 1902, and its president thereafter, passed upon the financial responsibility of persons seeking credit with the plaintiff, and he arranged with a trust company at Binghamton to discount commercial paper of the plaintiff's customers. The Lenape Coal Company, the Living Stone Coal Company, and the Montauk Coal Company were severally organized as corporations and engaged in the business of retailing coal in or near the city of New York, and the defendant was the owner of substantially all of the stock of each. Soon after the organization of such corporations to retail coal, they sought credit with the plaintiff, and their financial responsibility was investigated by B. The responsibility of each was found to be unsatisfactory, and B. so reported to the defendant, and the defendant replied that said companies were his companies and he would guarantee their credit by indorsing their paper.

On February 13, 1902, said Lenape Coal Company, for value received, executed and delivered to the plaintiff, as payee, its certain promissory note for $880.96, dated on that day, payable four months after date at a bank in the city of New York. On and between January 27, 1902, and May 13, 1902, the plaintiff, for value received, made thirty several drafts each on either said Lenape Coal Company, said Living Stone Coal Company, or said Montauk Coal Company, payable to the order of itself as payee, which drafts aggregated $26,833.15, each of which drafts was, for value received, accepted by the coal company on which it was drawn, payable at a place and on a day in each respectively specified. The drafts or bills were all similar in form, and the following is a copy of one of said bills: "1327.$^{41}/_{100}$. Coal Office of Haddock, Blanchard & Co., Incorporated, New York, Apl. 28, 1902. Four months after date pay to the order of ourselves thirteen hundred twenty-seven and $^{41}/_{100}$ dollars, value received, and charge the same to account of Haddock, Blanchard & Co., Incorporated. C. N. Blanchard, Asst. Treas. To Montauk Co., Brooklyn, N. Y." Indorsed across the face: "Accepted. Payable at the Binghamton Trust Co., Binghamton, N. Y. The Montauk Coal Co., Chas. B. Smith, Treas." Indorsed on the back: "Haddock, Blanchard & Co., Incorporated. C. N. Blanchard, Assistant Treasurer. John C. Haddock."

Said note after it had been signed by said Lenape Coal Company, and each of said bills after they had been accepted by the corporation on which they were severally drawn, were indorsed by the defendant before delivery, and thereafter each of them, so indorsed, was before maturity delivered to the plaintiff as payee, and the plaintiff thereafter and prior to their maturity severally indorsed and procured them to be discounted at a trust company at Binghamton. Said note and each of said bills were given and delivered to the plaintiff for the purchase price of coal sold and delivered by the plaintiff to the acceptors,

Digitized by Google

respectively, of said bills and the maker of said note, or in renewal in whole or in part of prior notes or bills given or accepted for the purchase price of coal so sold and delivered. Said note and each of said bills were so indorsed by the defendant for the accommodation of the maker of said note and the acceptor of said bills, respectively, and for the purpose of giving such maker and acceptors credit with the plaintiff, and in pursuance of an agreement between the defendant and the plaintiff by which the plaintiff agreed to sell coal on credit to the acceptors of said bills and to the maker of said note upon the defendant's guaranteeing the credit of said companies respectively, and the plaintiff was induced to take said accepted bills and said note, and each of them for such coal by reason of the indorsement of the said defendant and pursuant to said agreement that the defendant would be liable thereon to the plaintiff in case case the respective corporations primarily liable thereon should make default in payment thereof. The proceeds of said bills and note were remitted to the defendant at the New York office of the plaintiff to provide funds to pay for coal and other current expenses. At the time when said note and bills respectively became due they were presented for payment at the place where they were respectively made payable, and payment duly demanded, which was refused, and thereupon each was duly protested for non-payment, and notice thereof given to the plaintiff and to said defendant. Thereafter the plaintiff was compelled to take up said note and drafts and pay the amount due thereon, respectively, and became the owner and holder thereof and of each of them.

This action is brought to compel the defendant to pay to the plaintiff the amount of said note and bills pursuant to his said agreement with the plaintiff when they were severally indorsed by him, and the facts upon which the plaintiff's claim is based are stated in the complaint. The defendant denies that he indorsed the note and bills for the accommodation of and as surety for the retail coal companies, respectively; but the evidence is sufficient to sustain the findings of the court from which the statements of fact in this opinion have been taken. As the facts are found, if the intention of the parties is to prevail, the defendant should be required to pay to the plaintiff the amount of such note and bills as established by the judgment. The defendant contends that the position of his name upon the note and bills conclusively establishes that he indorsed the several instruments without liability to the plaintiff, and that parol evidence should not have been received to affect or overcome the alleged conclusive presumption arising from his indorsements as made.

In the early decisions by the courts in this State there was some confusion relating to the liability of a person who indorsed a note or bill prior to its delivery. Labron v. Woram, 1 Hill, 91; Herrick v. Carman, 12 Johns. 159; Hall v. Newcomb, 3 Hill, 233, s. c. 7 Hill, 416, 42 Am. Dec. 82; Hahn v. Hull, 2 Abb. 352. This court, in Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326, referring to a case of a person who for the accommodation of a maker indorsed a note payable to a third person, says: "Some confusion has been thrown around this subject from what has been finally settled to have been an error, treating such an indorsement as a guaranty and charging the indorser as a maker or guarantor. The doctrine was advanced in Herrick v. Carman, 12 Johns. 160, and was adjudged in Nelson

Digitized by Google

v. Du Bois, 13 Johns. 175, and Campbell v. Butler, 14 Johns. 349. It was attacked in Dean v. Hall, 17 Wend. 214, and in Seabury v. Hungerford, 2 Hill, 80, and was finally overthrown in Hall v. Newcomb, 3 Hill, 233, and the same case in error, 7 Hill, 416. The chancellor, in his opinion in the latter case, says: 'If the object of the second indorser was to enable the drawer to obtain money from the payee of the note upon the credit of the accommodation indorser, he may indorse it without recourse, and by such indorsement may either make it payable to the second indorser or to the bearer; and such original payee may then, as legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him and subsequent indorsement of the note to him by the second indorser.'" The court further say: "If a note be made and indorsed for the accommodation of A., who indorses it to another person, and afterward in the course of trade again becomes the holder, he could maintain no action against the maker and indorser for his accommodation, notwithstanding their apparent liability to him on the face of the paper. The fact of the accommodation making and indorsing might be proved to defeat the action, and it would establish that the agreement of the parties, contrary to the legal inference from the face of the paper, did not impose a liability on the maker and indorser to pay the party suing."

There has always been conflict among the courts of the several States both in asserting the principles upon which irregular indorsers upon commercial paper are to be held and in the conclusion arrived at in particular cases litigated. The number of cases is so great, and the possibility of even a partial reconciliation of them so remote, that we will confine our citation of authorities wholly to those in this State. It was well settled in this State for many years prior to the enactment of the Negotiable Instruments Law that a person who puts his name on the back of a bill or note before its delivery is presumably a second indorser and not liable to the payee, but the presumption could be rebutted by parol evidence to show that the intention of the indorser was to become surety for some prior party to the instrument. Moore v. Cross, supra; Bacon v. Burnham, 37 N. Y. 614; Meyer v. Hibsher, 47 N. Y. 265; Phelps v. Vischer, 50 N. Y. 69, 10 Am. Rep. 433; Clothier v. Adriance, 51 N. Y. 322; Hubbard v. Matthews, 54 N. Y. 43, 13 Am. Rep. 562; Coulter v. Richmond, 59 N. Y. 478; Easterly v. Barber, 66 N. Y. 433; Jaffray v. Brown, 74 N. Y. 393; Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507; Smith v. Weston, 159 N. Y. 194, 54 N. E. 38; Davis v. Bly, 32 App. Div. 124, 52 N. Y. Supp. 599, affirmed 164 N. Y. 527, 58 N. E. 648, 79 Am. St. Rep. 670; Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709; Lester v. Paine, 39 Barb. 616; Foerster v. Squier, (City Ct. N. Y.) 19 N. Y. Supp. 367; Reed v. Photo-Gravure Co., (City Ct. N. Y.) 13 N. Y. Supp. 798; Wyckoff v. Wilson, (Com. Pl.) 13 N. Y. Supp. 270; Luft v. Graham, 13 Abb. Prac. (N. S.) 175; Draper v. Chase Mfg. Co., 2 Abb. N. C. 79; Holz v. Woodside Brewing Co., 83 Hun, 192, 31 N. Y. Supp. 397; Meise v. Doscher, 68 Hun, 557, 23 N. Y. Supp. 49; Bank of Port Jefferson v. Darling, 91 Hun, 236, 36 N. Y. Supp. 153; Hendrie v. Kinnear, 84 Hun, 141, 32 N. Y. Supp. 417; Montgomery v. Schenk, 82 Hun, 24, 31 N. Y. Supp. 42; McPhillips v. Jones, 73 Hun, 516, 26 N. Y. Supp. 101; Staiger v.

Digitized by Google

Theiss, 19 Misc. Rep. 170, 43 N. Y. Supp. 292; Rose v. Packard, 4 Wkly. Dig. 427; Cuming v. Roderick, 16 App. Div. 339, 44 N. Y. Supp. 1033; McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000; Howard v. Van Gieson, 46 App. Div. 77, 61 N. Y. Supp. 349; Nagel v. Lutz, 41 App. Div. 193, 58 N. Y. Supp. 816.

The Negotiable Instrumens Law was first enacted in this State in 1897. Laws 1897, p. 734, c. 612. Section 113 of the said law provides: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." The defendant was within this definition an indorser of each of said instruments. Section 114 of the said law provides: "Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for th accommodation of the payee, he is liable to all parties subsequent to the payee." By this section of said law the presumption as established by the courts in this State was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute. Questions relating to the sufficiency of the pleadings are settled by the statute. A complaint upon a note or bill, without alleging a collateral agreement between the parties whose names are on the instrument, seeking to recover against a person except as provided by the statute, would clearly be demurrable.

The note of the Lenape Coal Company was payable to the plaintiff, a third person, and the defendant, according to the provisions of said section 114, is liable to the plaintiff, the payee therein. No serious contention has been made to the contrary. The serious question for consideration arises from the fact that the bills were payable to the maker and drawer thereof, respectively, and the defendant, as an indorser thereon before delivery, is not under the statute prima facie liable thereon to the plaintiff. Should parol evidence have been allowed to show the intent of the parties? We have not discovered any exception to the rule as established by the courts of this State allowing parol evidence as between the parties whose names appear on the bill or note to determine their liability as between themselves. It is frequently stated that where a note is payable to a person other than the maker, and is indorsed by a third person before delivery, the intention of the indorser is ambiguous and uncertain on the face of the paper, and such uncertainty justifies the receipt of parol evidence to determine the true intention of the parties. We do not see that any great certainty exists upon the face of a bill as to the true intention of the parties, where it is drawn to bearer or to the order of the maker, and it is indorsed by a third person after acceptance by the acceptor and before delivery to the payee and maker. There is a certain rule of presumption determined by common law or by statute, but the alleged reason for the rule in either case is not very apparent. The long-established rule to allow parol evidence that the intention

Digitized by Google

of the parties may prevail seems to have met with somewhat general approval, without discussing specifically the principles upon which such evidence is admitted.

It is said by Daniel in his work on Negotiable Instruments (5th ed., § 710): "Whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur, though not with entire unanimity, that as between the immediate parties the interpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction." Story on Promissory Notes, § 479. In Good v. Martin, 95 U. S. 90, 24 L. Ed. 341, the court say: "Considerable diversity of decision, it must be admitted, is found in the reported cases, where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee and before it is delivered to take effect; the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed. Denton v. Peters, L. R. 5 Q. B. 475. Facts and circumstances attendant at the time the contract was made are competent evidence for the purpose of placing the court in the same situation and giving the court the same advantages for construing the contract which were possessed by the actors. Cavazos v. Trevino, 6 Wall. 773, 18 L. Ed. 813."

It must constantly be borne in mind that the acceptance of a bill makes the acceptor the principal debtor. A bill, when accepted, becomes similar to a promissory note; the acceptor being the promisor, and the drawer standing in the relation of an indorser. Daniel on Negotiable Instruments (5th ed.), § 532. There is nothing in the Negotiable Instruments Law to indicate an intention on the part of the legislature to change the rule as established in this State relating to the receipt of parol evidence to determine the primary liability as between the persons whose names appear upon the instrument or as btween those secondarily liable thereon. By section 55 of the Negotiable Instruments Law it is provided: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." Parol evidence is necessary to determine whether a party to an instrument, including an indorser thereon, is an accommodation party, and also to determine which other party to the instrument he had accommodated. The plaintiff was the holder of the note for value, and the evidence showed that the defendant was an accommodation indorser for the benefit of the acceptor. The last subdivision of section 114, as we have quoted, makes parol evidence necessary to establish whether the indorser signed the instrument for the

Digitized by Google

accommodation of the payee. It is true that this section does not expressly state that, if the indorser signed for the accommodation of the acceptor, he is liable to all parties subsequent to the acceptor; but the fact that such a provision is not included in section 114 does not prevent the admission of parol evidence to determine generally the questions relating to an accommodation party as provided by section 55. The Negotiable Instruments Law by section 7 provides: "In any case not provided for in this act the rules of the law merchant shall govern." By section 118 of the Negotiable Instruments Law it is provided: "As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise." As we have seen, upon the acceptance of the bill the acceptor becomes the principal debtor and the one primarily liable to pay the amount of the bill, and all other parties to the instrument, including the maker and indorser, are secondarily liable. We are of the opinion that the maker of the bill is in legal effect and within the intention of this section an indorser, and that as between the plaintiff and the defendant parol evidence is authorized to determine the liability as between them.

The articles of the Negotiable Instrument Law relating to the presentation of bills and notes for payment and notice of dishonor (articles 7 and 8) further show an intention by the legislature to leave the order of liability among those whose names are on the instrument subject to determination by any competent evidence. Section 130 provides: "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument. . . . But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." Section 139 provides: "Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument." Section 140 provides: "Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented." Section 160 provides: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged." Section 186 provides: "Notice of dishonor is not required to be given to an indorser in either of the following cases: . . . (3) Where the instrument was made or accepted for his accommodation."

There is no reason that we can conceive why the legislature should intend to change the rule in regard to the admission of parol evidence as it had existed in this State for many years. All of the quotations that we have made from the Negotiable Instruments Law show that it has enlarged rather than restricted the rules allowing parol evidence to show the true liability and relation of the parties whose names appear upon the bill or note in all actions between themselves. It is certainly very material to the drawer of a bill whether an indorser signs it at his request or at the request and for the benefit of the acceptor. We do not think it was the

Digitized by Google

intention of the legislature by the enactment of section 114 of the Negotiable Instruments Law to establish a rule as to the liability of an irregular indorser conclusive on the parties to the instrument as between themselves in an action where the facts showing a different intention are fully alleged. All of the decisions of our courts since the enactment of the Negotiable Instruments Law tend to sustain the views herein expressed. Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658; Kohn v. Consolidated Butter & Egg Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265. In the case last mentioned McAdam, J., said: "Prior to the statute of 1897, supra, the allegation referred to was a necessary one in such cases, and, if denied, the onus of proving the allegation was on the plaintiff, for the payee was presumably the first indorser. Daniel's Neg. Inst. (4th ed.), § 704; Wood's Byles' Bills, 151, note, and cases before cited. Since the statute the legal presumption is changed where the complaint alleges that the irregular indorsers indorsed the paper 'before delivery' to the payee; and when this fact is established the onus is cast upon such indorsers to allege and prove that, notwithstanding such delivery, the payee was to become first indorser according to the customary form of the contract, and that they did not indorse for the purpose of lending their credit to the maker or with the intention of becoming liable to the payee. That this is the proper interpretation of the act is obvious. The true intention of indorsers as between themselves can always be shown by oral evidence. Daniel's Neg. Inst., supra; 4 Am. & Eng. Ency. of Law (2d ed.) 492 et seq.; Guild v. Butler, 127 Mass. 386; Cady v. Shepard, 12 Wis. 639; Benjamin's Chambers' Bills (2d Am. ed.) 250; Witherow v. Slayback, 158 N. Y. 649, 58 N. E. 681, 70 Am. St. Rep. 507. To go further, and decide that the statute intended to create an incontestable liability against irregular indorsers, would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interest of law reform."

The judgment should be affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment affirmed.

Decision No. 1120.

MOHR v. RICKGAUER.

(Supreme Court of Nebraska. Oct. 8, 1908)

117 N. W. 950.

BILLS AND NOTES — CONSIDERATION — BROKER'S SERVICES.

While an oral promise to pay a commission to a broker for the sale of real estate, is unenforceable because of the statute of 1897 (Laws 1897, p. 304, c. 57), so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission.

(Syllabus by the Court.)

Digitized by Google

Commissioners' Opinion. Department No. 2. Appeal from District Court, Boyd County; Harrington, Judge.

Action by William P. Mohr against Henry Rickgauer. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

N. D. Burch and E. J. Clements, for appellant. W. T. Wills, for appellee.

CALKINS, C. This was an action upon a promissory note. The evidence tended to show that the defendant employed the plaintiff as broker to sell 480 acres of land, and orally agreed to pay him as commission for such services the sum of one dollar per acre; that, after plaintiff performed such contract on his part, a dispute arose as to the amount which the plaintiff was entitled to receive, and to settle such controversy the defendant executed the note in question for the sum of $200. The court below took the view that an oral contract to pay plaintiff a commission being unenforceable because of the provisions of the Act of 1897 (chapter 57, p. 304, Laws 1897; section 74, c. 73, Comp. Stat. 1897), such services did not constitute a sufficient consideration to support the note, and directed a verdict for the defendant. From a judgment entered upon this verdict, the plaintiff appeals.

The statute in question has been sustained, and it has been frequently held that, where the employment is oral, there can be no recovery upon the contract (Allen v. Hall, 64 Neb. 256, 89 N. W. 803; Baker v. Gillan, 68 Neb. 368, 94 N. W. 615; Covey v. Henry, 71 Neb. 118, 98 N. W. 434; Danielson v. Goebel, 71 Neb. 300, 98 N. W. 819); nor upon a quantum meriut for services performed (Blair v. Austin, 71 Neb. 401, 98 N. W. 1040; Rodenbrock v. Gress, 74 Neb. 409, 104 N. W. 758; Barney v. Lasbury, 76 Neb. 701, 107 N. W. 989). Now, we have presented the question whether such services constitute a sufficient consideration for a written promise to pay. Like the statute of frauds, of which it is a virtual extension and enlargement, it was designed to exclude oral testimony as a means by which the rights of litigants could be determined in certain cases where experience has shown that it was particularly liable to abuse. Baker v. Gillan, supra. To make a concrete application of the reason for the law, the legislature, promising that a liability might be wrongfully imposed upon a defendant by false testimony if it were permitted to be established by oral evidence, has provided that he shall not be charged except upon a written contract subscribed by himself. When, however, the defendant, after receiving the benefit of services, executes a written promissory note in payment thereof, it would seem that the reason of the law was fufilled. The contract is then established by his own signature. The object of the statute is, as we have seen, to prevent frauds and perjuries; and, while certain contracts are by the terms thereof declared void, the uniform construction placed upon the statute by the courts renders it not void, but merely unenforceable. Riley v. Bancroft's Estate, 51 Neb. 864, 71 N. W. 745. It is within the principle laid down by Baron Parke in Earle v. Oliver, 2 Exch. 71, that, "where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or

Digitized by Google

common law meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." This doctrine has been applied to cases where the consideration of a contract made by a feme sole was an unenforceable contract made by her while covert, as well as to cases where the consideration was an oral promise to answer for the debt of a third person unenforceable by reason of the statute of frauds. Goulding v. Davidson, 26 N. Y. 604; Rogers v. Stevenson, 16 Minn. 68 (Gil. 56); Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279.

We are satisfied that the principle referred to applies to the case we are considering, and that the obligation of the defendant, while unenforceable so long as it remained in parol, was a sufficient consideration for his written promise to pay the same.

We therefore recommend that the judgment of the District Court be reversed and remanded for further proceedings in conformity with this opinion.

FAWCETT and ROOT, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed and the case remanded for further proceedings in conformity therewith.

Decision No. 1121.

LUCKENBACH v. McDONALD.

SAME v. KUNZIG.

(Circuit Court, E. D. Pennsylvania. October 9, 1908.)

164 Fed. 296.

BILLS AND NOTES — LIABILITY OF INDORSER — PRESENTMENT AND NOTICE OF NON-PAYMENT — ALTERATION OF INSTRUMENTS — EFFECT.

1. Defendants were respectively president and secretary of a corporation and also directors and large stockholders. The corporation had no assets whatever from which it could realize money, but was engaged in the execution of two contracts which defendants regarded as valuable. For the purpose of continuing with performance of the contracts they borrowed money from plaintiff's testator, giving a note, which they signed on behalf of the corporation, and also, with another director, indorsed individually. When the note matured the company had no money with which to pay it, as defendants as its executive officers knew. Held, that under Negotiable Instruments Act, Pa., May 16, 1901 (P. L. 206), § 80, which provides that "presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he had no reason to expect that the instrument will be paid if presented," and section 115 (P. L. 209), which provides that "notice of dishonor is not required to be given to an indorser . . . (3) where the instrument was made or accepted for his accommodation," the holder of the note was not

Digitized by Google

required to present it to defendants for payment by the company, nor to give them an unnecessary notice of its dishonor, in order to hold them as indorsers.

2. An alteration made in a note after it was signed by an indorser, but before its delivery, by or with the consent of the agent of such indorser, authorized to act for him in the transaction, does not release him from liability.

At law. On motion for judgment non obstante veredicto and for a new trial.

Charles Biddle, for plaintiff. Thomas McConnell, Jr., J. Henry Williams, and John G. Johnson, for defendants.

HOLLAND, District Judge. This suit is brought by the executor of the payee of a note for $10,000, dated July 2, 1903, payable four months after date, to the order of the testator, at Philadelphia, with interest, against the defendant as indorsers. The note is as follows:

"$10,000. Philadelphia, Pa., July 2, 1903.

"Four months after date *I* promise *to order to the order* of Lewis Luckenbach ten thousand dollars, at 1336 Beach St., Philadelphia, without defalcation, for value received. Holden Regealed Ice & Machine Co,

"Henry J. Kunzig, Prest.

"Frank J. McDonald, Secy."

Said note was indorsed as follows:

"Henry J. Kunzig.

"Frank J. McDonald.

"Sommers J. Smith."

At the trial of the case the uncontradictory evidence disclosed the facts that the ice machine company had no assets whatever with which to meet its indebtedness, and that it was engaged at the time in the execution of two contracts which were considered valuable. The board of directors consisted of Henry J. Kunzig, Frank J. McDonald, Sommers J. Smith, and Franklin S. Horn. All these men were large stockholders, very much interested in the completion of the contract. They found it necessary to borrow money to continue the work, and Lewis A. Luckenbach was appealed to for aid. He loaned them $10,000, taking the company's note, with the understanding that Kunzig, McDonald, and Smith should indorse the same, which they did. The note was executed without authority of the board of directors, and signed by Kunzig as president and McDonald as secretary. McDonald never met Luckenbach, but was represented by Kunzig, who transacted the matter and secured the loan, went to New York, received the check and the note from Mr. Luckenbach, brought them to Philadelphia, where the note was executed by Kunzig as president and McDonald as secretary, and indorsed by Kunzig, McDonald, and Smith, in accordance with the arrangement made by Kunzig. Kunzig, McDonald, and Smith were the three active directors and conducted the business of the company. The company had no other assets whatever, excepting the patents, upon which they could not realize, and the consideration for the contracts which were being executed by Kunzig, McDonald, and Smith with the money borrowed from Luckenbach. When the note came due the indorsers were aware of the fact that there were no funds to pay

Digitized by Google

the note, as they were the parties who were superintending the work of the company. It was not presented for payment, nor was there formal notice given either to Kunzig, McDonald, or Smith of its dishonor. The plaintiff claimed at the trial of the case that he was not required to present the same for payment, nor give notice to the indorsers, to enable him to recover.

The court directed the jury to render a verdict in favor of the plaintiff, first, because the note was made for the benefit of the indorsers; and, secondly, they were officers of the particular institution that was to pay it when it came due, and to whom it had to be presented for payment, and who knew all about it. They knew there were no funds to pay it, and had all the knowledge that could have been given to them by a protest in the regular way. The court having refused to direct a verdict in favor of the defendants, in accordance with their motion, all the evidence taken at the trial was duly certified and filed as part of the record, and the defendants in due time moved the court for judgment non obstante veredicto.

At the argument on this motion it was urged that under the Negotiable Instruments Act of Pennsylvania of May 16, 1901 (P. L. 206), the defendants could only be held as indorsers under section 63 of the act, which provides:

"A person placing his signature upon the instrument other than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be found in some other capacity."

If there was no other evidence in the case except the note itself, with these defendants appearing as they do upon the back of the note as indorsers, of course, this section would apply, and they could not be held in any other capacity. It would then have been necessary for the plaintiff to prove presentment and notice. But this section has no application, because the uncontradicted evidence, aside from the note, shows that the case falls within sections 80 and 115 of the Negotiable Instruments Act. It is provided in section 80 that:

"Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he had no reason to expect that the instrument will be paid if presented."

And section 115 provides that:

"Notice of dishonor is not required to be given to an indorser in either the following cases: . . . (2) Where the indorser is the person to whom the instrument is presented for payment; (3) where the instrument was made or accepted for his accommodation."

The evidence shows that the indorsers were the real parties in the transaction, and the name of the ice company was only used for the purpose of carrying out the transaction between the indorsers and the lender. The plaintiff, if he had endeavored to present the note at maturity, would necessarily have presented it to either Kunzig or McDonald. These men knew there were no other parties who could pay the note but themselves in any capacity, and they had all the information which they could have received if every formality required by the law had been complied with. For these reasons the motion for judgment non obstante veredicto is overruled.

There are also motions and reasons for a new trial in both cases,

Digitized by Google

and as to Kunzig the reasons are (1) that the court erred in refusing to affirm the point submitted by the defendant, viz., that under all the evidence the verdict must be for the defendant; (2) that the court erred in directing a verdict for plaintiff. The same reasons are filed in the motion for a new trial in the case against McDonald, and as to the latter an additional reason is urged that the court erred in refusing to permit the defendant (McDonald) to file an affidavit of defense nunc pro tunc, stating that the note sued upon had been altered by the addition of the words "with interest" after its execution and delivery, and that it was indorsed and delivered by him without his knowledge or consent, and that this fact became known to him only at the trial of the cause. The fact was disclosed when the first witness was called, and this motion to amend was not made until the close of the trial of the case.

The evidence showed that Kunzig represented himself, McDonald, and Smith in negotiating the loan from Luckenbach. Kunzig went to New York for the money, received the check and the note, brought it to Philadelphia, placed the check in the treasury of the company, and returned personally with the note after it had been indorsed by himself, McDonald, and Smith. He was their representative, and was authorized to return the security which he agreed with Luckenbach should be executed in his favor to guarantee the loan. It was put in his possession for that purpose, and he represented the other defendants in the alteration as much as he represented himself. Robertson v. Hay, 91 Pa. 242. So that, as the amendment could not have changed the result if allowed, the defendant was not hurt by the ruling of the court.

The motion for a new trial is therefore overruled, and the other reasons for a new trial in both cases are overruled, for the reasons given on the motion for judgment non obstante veredicto.

Decision No. 1122.

McNEELY CO. BANK OF NORTH AMERICA.

(Supreme Court of Pennsylvania. June 2, 1908.)

70 Atl. 891.

BANKS AND BANKING — DEPOSITS — DUTY OF DEPOSITOR TO NOTIFY BANK OF FORGERY — PAYMENT ON FORGED CHECKS — LIABILITY OF BANK TO DEPOSITOR— FAILURE OF DEPOSITOR TO NOTIFY BANK OF FORGERIES — EFFECT.

1. It is the duty of a depositor in a bank, on discovering that it has paid and charged to his account either a check bearing his forged signature as drawer or his check on the forged indorsement of the payee, to promptly notify it of the forgery.

2. No payment by a bank on a forged signature of a depositor as drawer of a check or on a forged indorsement of his payee can effect him.

3. A depositor, failing to promptly notify a bank of its discovery of forgeries, cannot recover of the bank irrespective of whether the bank could have protected itself had it been promptly notified.

Digitized by Google

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by the McNeely Company against the Bank of North America to recover the amount of checks alleged to have been wrongfully paid by the bank. From an order dismissing exceptions to the report of the referee, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

G. W. Pepper and B. F. Pepper, for appellant. Alex. Simpson, Jr., for appellee.

BROWN, J. McNeely Company, a corporation, was a depositor with the appellee, the Bank of North America, and had in its employ one Charles S. Reber, who between April 20, 1897, and February 24, 1903, forged the names of payees on ninety checks issued by it. Some of these checks were paid directly to him by the appellee, and others he deposited to the credit of his account with certain banks and bankers, who collected them through the clearing house. Each of said checks was charged to plaintiff's account with the defendant, and the amount thereof entered as a charge against its deposit in its bank book when the same was settled. On each settlement the balance was struck and entered, after deducting the amount of the checks paid on the forged indorsements. During the period of these forgeries the bank book of the appellant was settled seventy-six times, and all checks that had been paid by the bank, including those bearing the forged indorsements, were regularly returned to the appellant at each settlement of its bank book. Reber continued in its employ until April 1, 1903. Some of his forgeries were discovered on or about January 1, 1904, and within two or three weeks thereafter a very large number of the ninety forged indorsements were discovered. The twenty-fourth finding of fact of the referee is: "No notice was given by the plaintiff to the defendant of the forgeries or any of them until Aprill 11, 1904. As stated in finding No. 10, the bank book was settled three times, viz., on February 1, 1904, February 28, 1904, and March 31, 1904, after the discovery of the forgeries and before notice was given thereof on April 11, 1904. During the same period, Robert K. McNeely, who was a director of the bank, attended directors' meetings weekly from January 4, 1904, to April 11, 1904, a total of fourteen meetings, but gave no notice to the bank concerning the forged indorsements or complaining of their payment." Robert K. McNeely, referred to in the foregoing finding, was a director of the company and its secretary and treasurer, having charge of its offices and the examination of its trial balances. Reber was able to conceal his forgeries from his employer by a complicated and ingenious system, which need not be here described, for the referee has found that the appellant was not negligent in failing to discover them sooner, though they extended through a period of nearly six years. The reasons for this finding are unimportant, if the legal conclusion of the referee and court was correct, that the appellant so delayed giving notice to the bank of the forgeries, after it had discovered them, that it cannot recover the amount paid and charged to its account on any of the forged

Digitized by Google

indorsements. The fact that Reber had forged some of the indorsements was, as stated, discovered abount January 1, 1904, and within two or three weeks thereafter it was known to the appellant that a very large number of the ninety forgeries had been committed; but no notice of this was given to the bank until nearly three months afterwards. The duty of a depositor in a bank, upon discovering that it has paid and charged to his account either a check bearing his forged signature as drawer or his check on the forged indorsement of the payee, is to promptly notify it of the forgery. This notification is not only a duty, but it is what a depositor will instinctively do on discovering, upon the return of his bank book with canceled checks charged to his account, that there are among them some which he never signed or which were not paid to the payees named in them. This duty is not questioned by the learned counsel for the appellant. Their contention is that, for the disregard of it, a depositor is not to be barred from recovering from the bank what it may have paid on his forged signatures or on the forged indorsements of payees named in checks drawn by him, unless, by his failure to promptly notify it of the forgeries, it has lost rights over against other parties, and the burden is upon it to prove such loss. Authorities are not wanting to support this, but the referee and court below did not follow them. Relying upon others, they held that the plaintiff, by reason of its failure to promptly notify the bank of its discovery of the forgeries, could not recover, even though the bank had offered no evidence that it could have protected itself and the plaintiff had not shown that it could not if prompt notice had been given.

The relation between a bank and its depositor is a contractual one. Its undertaking with its depositor is to pay his checks, if he has sufficient funds with it for that purpose, and it assumes all the risk as against him of a mispayment in paying and charging to his account a check which he has not signed or one which he has signed bearing a forged indorsement of the payee. To his account it may not charge such a check. If it does, the depositor can recover from it the amount so charged. No payment by a bank on a forged signature of a depositor as drawer of a check or on a forged indorsement of his payee can affect him. His right is to get back from the bank whatever he has deposited with it, less what has been properly paid out on his orders. The responsibility of the bank to the depositor is absolute, and it can retain no money deposited with it by him to reimburse it for any mispayment it has made out of such deposit; but it can recover from a forger responsible for the mispayment, or from those who, by their indorsement of a check, have vouched for previous indorsements or the genuineness of the signature of the alleged drawer. The right of a bank to recover from a forger, or from those to whom it may have paid a check bearing the forged signature of one of its depositors, or a forged indorsement, is its only remedy for the fraud practiced upon it by the forgery. The depositor's money is not affected by it, and, when he is the first to discover it, it is not reasonable that he should not be required to give prompt notice of it to the bank, if he intends to hold his depository liable for the mispayment, and this without regard to what may or may not result from a prompt effort to recover from

Digitized by Google

the party or parties who may be liable to the bank for the mispayment. The depositor can gain nothing by withholding knowledge of the forgery, but the bank, if kept in ignorance of it after his discovery of it, may lose everything. As soon as a bank learns that it has paid a check on a forged signature of a depositor, or on a forged indorsement on his check, it is its duty to promptly restore to the depositor's account what was improperly taken from it, and its right at the same time is to proceed against those who wrongfully got the money. This right is to proceed immediately, and to the promptness with which a bank is able to exercise its recovery is often due. When a depositor withholds from his bank his knowledge of the forgery, he withholds from it this right to proceed promptly for its own protection. It may or may not be able to recover from the forger by promptly proceeding against him, but its right is to try by so proceeding; and, when one of its depositors discovers that it has innocently sustained a loss, he ought, not only in all good conscience, but as a legal duty, to notify it at once of its mistake; for by withholding from it what he has discovered he can, as just stated, gain nothing, but it may lose all. A forger may be insolvent or beyond the reach of civil or criminal process, but, by prompt proceedings against him, others may become interested in him and come to his assistance, who after delay may not do so. This incident to a bank's right to promptly proceed against a forger is not to be overlooked. Whenever a depositor knowingly withholds from it knowledge without which it cannot so proceed in an effort to protect itself, he ought to be regarded, when he comes to enforce alleged rights against it, as having withheld from it a substantial right, without regard to what might or might not have resulted from a prompt exercise of that right. When an indorser on a promissory note defends on the ground that prompt notice was not given him of its non-payment, the holder will not be heard in reply that, if notice of the non-payment had been promptly given, it would not have helped the indorser, because he could have recovered nothing from the maker of the note or prior indorsers. The right of the indorser on a note is to prompt notice of its non-payment, that he may have an opportunity of proceeding promptly against the maker or prior indorsers, without regard to what may result from his efforts, and, if this right is not given him, his liability is at an end. "The insolvency of the maker of a note, though known to the indorser, ought not to discharge the holder from giving notice. There are various degrees of insolvency, and it rarely happens that a man is totally insolvent. So that there is a chance of getting something by an application to the debtor. Besides, if a man has nothing of his own, he may have friends, who, to relieve him from pressure, will do something for him. The indorser, therefore, has a chance of securing himself, at least in part. The only reason that can be assigned for insolvency taking away the necessity of notice is that notice could be of no use to the indorser; but it is almost impossible to prove that it might not have been of use. Therefore it is necessary." Barton v. Baker, 1 Serg. & R. 334, 7 Am. Dec. 620. Why should a different rule apply to a bank, which never knowingly pays on a forgery, but, in cases like the one now before us, is always an innocent victim?

Digitized by Google

Delay by a depositor in giving notice to a bank means not only its enforced delay in proceeding against those liable to it, but means loss of evidence as well; and, if the rule for which appellant contends should prevail, a bank might be deprived of the opportunity of showing that prompt proceeding on its part would have resulted in its recovering for its loss. And, again, in a suit brought by a depositor against a bank to recover the amount which it may have improperly paid on a forgery, the issue is the forgery. This issue ought not to be complicated with another, and a speculative one, as to whether anything might have been recovered from the forger, if prompt notice had been given to the bank of the forgery. The only reasonable and logical rule is the one adopted by the referee and the court below. Our own cases are in harmony with it, and it is approved by high authority. A different one would be putting a premium upon the laches of a depositor, and give to a dishonest one opportunity to help a forger to escape.

In Rick v. Kelly and Rick v. Fisher, 30 Pa. 527, the plaintiffs below purchased from the defendants notes bearing the genuine signature of George Fox, as maker, but the forged indorsements of the payee. In reversing the judgments in favor of the plaintiffs and announcing the general rule that notice of a forgery within a reasonable time after discovery is necessary for the maintenance of an action for the recovery of the money paid for such notes, it was said by Porter, J.: "The notes in this suit contained a genuine name. For aught that appears, timely application to that party might have saved the debt, for others thought proper to obtain judgments and sell his property. At some stage of the business the plaintiffs obtained knowledge of the forgery, for they brought the actions and put the fact on record. Why not inform the defendant of his risk, and give him a chance of escape by a direct blow at the maker? What justice could there be in permitting a holder to hold on until the very close of the period of limitation, and then to spring a suit on the seller, when the genuine parties are dead and their estates gone?" In Myers v. Southwestern National Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672, in a suit to recover what had been paid by the bank on the forged signature of the plaintiff to checks, judgment on a verdict directed for the defendant was sustained, because the plaintiff had not promptly notified it of the forgeries after he was held to have had notice of them, and we said: "It was not the bank's fault that the first forgeries were not promptly discovered and notice thereof given. If the plaintiff's duty to the bank had been performed at the proper time, the fact would have appeared that the bank had charged plaintiff, on his bank book, with the payment of two items ($300 and $200) for which no vouchers appeared among the checks handed to him by his clerk. These vouchers, the two forged checks, had been abstracted and destroyed by the latter. No objection having been made at the time of the first settlement, the bank had a right to assume that everything was correct, including the two checks purporting to be signed by him. His silence was tantamount to a declaration to that effect, and, in afterwards honoring checks signed by the same person, the bank had a right to consider the fact that the signatures had been at least tacitly recognized by the plaintiff as genuine. While the plaintiff was not charge-

Digitized by Google

able with the knowledge of his clerk that the latter had committed the forgery, he was clearly responsible for the acts and omissions of his clerk in the course of the duties with which he was intrusted, viz., to receive the checks from the bank, take them to his employer's office, compare the amounts thereof with the amounts in the bank book and check book, etc. In view of the uncontradicted evidence as to the foregoing facts it cannot be doubted that, as between the bank and the plaintiff, the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question, and approve or reject them within a reasonable time. In contemplation of law the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were claimed. The bank was therefore entitled to have them examined, and, if rejected, returned within a reasonable time. That was not done, and because of plaintiff's failure to perform his duty in that regard he should not be permitted to recover. Any other rule would be inconsistent, not only with general and long-established custom, but also with well-settled principles of law on the subject. Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 107, 6 Sup. Ct. 657, 29 L. Ed. 811; United Security, etc., Co. v. Central Nat. Bank, 185 Pa. 586, 40 Atl. 97."

A very learned referee in United Security Life Insurance & Trust Company of Pennsylvania v. Central National Bank of Philadelphia, 185 Pa. 586, 40 Atl. 97, in his report, confirmed by the court, held that the plaintiff was not entitled to recover from the defendant the amounts paid and charged to its account on forged indorsements, because it had not promptly notified the defendant of the forgeries after it had what the referee held to be constructive notice of them. The judgment was reversed solely on the ground that the referee had erred in finding that the plaintiff had had constructive notice of the forgeries on March 27, 1894, and judgment was directed to be entered for it, because, when it actually discovered the forgeries on May 17, 1894, it gave immediate notice to the defendant. What the referee said and what was not held to be error was: "The referee is of opinion that it is not necessary for the defendant to make effective the defense based upon the want of diligence of the plaintiff in giving notice of the forgery to show with certainty that had notice been given at an earlier day a fund belonging to Williams (the forger) was in existence which could have been attached and held. When it is once shown that the plaintiff failed to give prompt notice of the discovery of the forgery, the plaintiff's right of action is gone. The law assumes, and does not find it necessary to conduct an inquiry to verify the assumption, that, had the notice been given promptly, the Central Bank might have taken steps to protect itself as against Williams." A sentence from the opinion in Iron City National Bank v. Ft. Pitt National Bank, 159 Pa. 46, 28 Atl. 195, 23 L. R. A. 615, is pointed to by counsel for the appellant as an expression from this court sustaining their contention. In that case the present chief justice did say that all a bank which has paid a forged check of one of its depositors "need do in any case is to give notice promptly according to the circumstances and the usage of the business, and, unless the position of the party receiving the money has been altered for the worse in the

Digitized by Google

meantime, it would seem that the date of notice is not material." This must be read with reference to the facts in that case. As to those in the present one, it is not applicable. There the Fort Pitt National Bank, the defendant, which received the money on the forged check, had paid it out on the check of its depositor, to whose credit it had been placed, and all that we meant to say was that if the bank had not paid it out, and could still have protected itself by withholding it, the date of the notice of the forgery would not have been material.

The rule followed by the learned referee and court below is the only reasonable, logical, and proper one in this class of cases. It is approved by the Supreme Court of the United States in Leather Manufacturers' Nat. Bank v. Morgan et al., 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, where it is said by Harlan, J.: "If the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding, to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend upon a calculation whether the criminal had at the time the forgeries were committed or subsequently property sufficient to meet the demands of the bank. . . . As the right to seek and compel restoration and payments from the person committing the forgeries was in itself a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively exercising it. Continental Bank v. Nat. Bank of the Commonwealth, 50 N. Y. 583; Voorhis v. Olmstead, 66 N. Y. 113, 118; Knights v. Wiffen, L. R. 5 Q. B. 660; Casco Bank v. Keene, 53 Me. 103; Fall River Bank v. Buffinton, 97 Mass. 498."

Other questions raised by the appellant need not be considered in view of the correct conclusion of the court below that its delay in giving the appellee notice of the forgeries bars its right to recover.

The assignments of error are all overruled, and the judgment is affirmed.

Decision No. 1123.

WOLENSTENHOLME v. SMITH et al.

(Supreme Court of Utah. April 14, 1908)

97 Pac. 329.

BILLS AND NOTES — ACCOMMODATION MAKER — DISCHARGE FROM LIABILITY — "PERSON PRIMARILY LIABLE."

Under the Negotiable Instruments Law (Laws 1899, pp. 127, 130, 131, 137, 138, 147, c. 83, §§ 29, 60, 63, 119, 120, 192), defining an accommodation maker, making him liable to a holder for value, providing that a negotiable instrument

Digitized by Google

is discharged by payment, etc., and that a person secondarily liable on the instrument is discharged by any act which will discharge a simple contract for the payment of money, etc., and defining a person primarily liable as one who by the terms of the instrument is absolutely required to pay the same, etc., an accommodation maker of a note is not relieved from liability by an extension of time of payment without his knowledge or consent.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Daniel Wolstenholme, special administrator of the estate of James Megeath, deceased, against Grant H. Smith and another. From a judgment for plaintiff, defendant J. E. Darmer appeals. Affirmed.

Stephens, Smith & Porter, for respondent. S. P. Armstrong, for appellant.

STRAUP, J. This is an action brought to recover a judgment on a promissory note. The note reads: "Salt Lake City, Utah, Sept. 13, 1901. Sixty days after date, without grace, for value received, we or either of us promise to pay to the order of Joseph P. Megeath, three hundred dollars ($300.00) in United States gold coin, negotiable and payable at the Bank of Commerce, at Salt Lake City, Utah, without defalcation or discount, with interest at the rate of one per cent. per month from maturity until paid, both before and after judgment, and if suit be instituted for the collection of this note we agree to pay thirty dollars ($30.00) attorney's fee. Grant H. Smith. J. E. Darmer." The note was indorsed to James Megeath. The suit was brought by his administrator. The defendant Darmer, answering the complaint, alleged that his co-defendant, Smith, was the principal debtor; that he (Darmer) received no part of the loan or consideration for which the note was given, and that he signed it only as surety, which facts were known to both Joseph P. and James Megeath when the note was executed; that by a binding agreement Smith, and the holder of the note, extended the time of payment to October, 1902, without his knowledge or consent; that no demand was made upon him for payment until more than four years after the note became due; and that, by reason of the extension of time and of the delay in payment, he was prevented from protecting and securing himself. The court found the facts substantially as alleged in the answer, but as conclusions of law found that the defendant Darmer was a maker and primarily liable on the note, and therefore rendered judgment against him. From this judgment, the defendant Darmer has appealed.

There is no doubt that under the decisions of this court prior to the enactment of chapter 83, page 122, Laws 1899, relating to negotiable instruments, the facts alleged in the answer and found by the court constituted a defense, and discharged Darmer. It was the law generally in this country that a binding agreement between the principal and the holder of a negotiable instrument, whereby the time of its payment was extended, relieved the surety, though he apparently signed as maker, if the holder had knowledge or notice that he was in fact a surety. It is, however, contended by the respondent that the law in this respect has been changed by the act in question. On

Digitized by Google

the other hand, the appellant contends that it has not been changed, and that the law in this regard is now as it was before the enactment. We cannot agree with appellant in this contention. The Negotiable Instruments Law enacted in 1899 is like that of the Bills of Exchange Act of 1882 of England, and of the Negotiable Instruments Law of New York adopted in 1897, and of about nineteen other States.

The particular sections pertinent to the question are:

Section 29: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

Section 60: "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor."

Section 63: "A person placing his signature upon an instrument, otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

Section 119: "A negotiable instrument is discharged: I. By payment in due course by or on behalf of the principal debtor. II. By payment in due course by the party accommodated where the instrument is made or accepted for accommodation. III. By the intentional cancellation thereof by the holder. IV. By any other act which will discharge a single (simple) contract for the payment of money. V. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."

Section 120: "A person secondarily liable on the instrument is discharged: I. By an act which discharges the instrument. II. By the intentional cancellation of his signature by the holder. III. By the discharge of a prior party. IV. By a valid tender of payment made by a prior party. V. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved. VI. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

Section 192: "The person 'primarily' liable on an instrument is a person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

By subdivision 6 of section 120 it will be seen that a person secondarily liable on the instrument is discharged by an agreement binding on the holder to extend the time of payment. If, therefore, the appellant was only secondarily and not primarily liable on the instrument, he is discharged. Otherwise not, unless the instrument was discharged. Section 192 makes a person primarily liable on the instrument who by the terms of the instrument is absolutely required to pay it. And by section 29 an accommodation party in fact is liable on the instrument to the holder notwithstanding such holder at the time of the taking of the instrument knew him to be only an accommodation party. Messrs. Eaton & Gilbert, authors of a recent work on Negotiable Paper, in considering the Negotiable Instruments Law

Digitized by Google

in question, say in section 123f: "The statute only provides for the discharge by an extension of time of a person secondarily liable on the instrument. By the terms of the statute a person is primarily liable who by the terms of the instrument is absolutely required to pay the same. All others are secondarily liable. An accommodation maker or acceptor is absolutely liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. It would seem to follow that the statute has disposed of the conflict of authority upon this question by holding the accommodation acceptor or maker to his apparent engagement as a principal debtor, and making him liable notwithstanding an indulgence given to the indorser or drawer for whose benefit he became a party to the instrument." The same question raised here was considered in the case of Cellers v. Meachem, (Oregon) 89 Pac. 426, 10 L. R. A. (N. S.) 133, and the conclusion was there reached that, under the new law, an accommodation maker was primarily liable, notwithstanding any knowledge the holder of the instrument might have had as to his relationship with the principal. To the same effect are the cases of Vanderford v. Farmers & Mechanics' Nat. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129, and National Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422. These cases are criticized by the appellant. He contends that the provisions of subdivision 4 of section 119, which provide that a negotiable instrument is discharged "by any other act which will discharge a simple contract for the payment of money," was disregarded. He urges that a contract of surety is a simple contract, and the making of a binding agreement for an extension of time to the principal debtor has long been held to be an "act" sufficient to discharge the contract of the surety, and hence the facts alleged in the answer and found by the court were clearly a defense which is included in the general language of subdivision 4 of section 119. To reach such a conclusion one must assume that the appellant was not primarily, but secondarily, liable on the instrument — the very thing to be decided — and the law that a person signing a negotiable instrument is not bound by his apparent obligation, but by his obligation in fact, has not been changed. Under the new law the appellant's apparent engagement as a maker and principal debtor is his real and actual engagement. He signed the note as a maker. By the terms of the instrument, he is absolutely required to pay it. The statute in such case makes him an actual principal and renders him primarily liable, though in fact he received, with the knowledge of the holder, no part of the consideration, and only signed the note for the purpose of lending his name to another. Having signed the note as an apparent maker and principal debtor, he cannot thereafter be heard to assert the contrary so as to affect his liability on the instrument. Section 119 deals, not with the discharge of parties, but with the discharge of the instrument. Of course, if the instrument is discharged, all parties are discharged, whether primarily or secondarily liable. If it was meant that a binding agreement to extend the time of payment should discharge a person, whether primarily or secondarily liable, and is included, as is contended, in the general language of subdivision 4 of section 119, then there was no occasion to insert the provision in section 120 making it a ground

Digitized by Google

of discharge as to a person secondarily liable. Being so inserted strongly indicates that it was the intention to make it a ground to discharge a person only secondarily liable, and not a person primarily liable. While an agreement binding on the holder to extend the time of payment was generally held sufficient to discharge a surety, yet it did not discharge the instrument, nor the principal debtor. It was not such an act as will discharge the instrument itself within the meaning of subdivision 4 of section 119.

Being of the opinion that the appellant is primarily liable on the instrument, and that the facts alleged in the answer and found by the court to not constitute a discharge of the instrument, it follows that the judgment of the court below must be affirmed, with costs. It is so ordered.

McCARTY, C. J., and FRICK, J., concur.

Decision No. 1124.

ROBINSON v. BANK OF WINSLOW.

(Appellate Court of Indiana, Division No. 2. October 13, 1908.)

85 N. E. 793.

BANKS AND BANKING — PAYMENT OF CHECK — WRONGFUL INDORSEMENT — LIABILITY — PRINCIPAL AND AGENT — UNAUTHORIZED INDORSEMENT BY AGENT — RATIFICATION — SPECIAL AGENCY.

1. Plaintiff gave his agent a note against B for collection, in payment of which B gave the agent a check on defendant bank, payable to plaintiff's order. The agent cashed the check at defendant's bank, after indorsing plaintiff's name thereon with the bank's consent, and converted the proceeds. Held, that the agent's authority to collect the note did not authorize her to indorse the check, and the bank was therefore liable to plaintiff for the proceeds.

2. Where an agent, empowered to collect a note, received a check therefor payable to her principal, on which she indorsed the principal's name and obtained the money from the payee bank, which she converted, the principal's act in claiming the check did not constitute a ratification of the agent's act in indorsing the check and receiving the money.

3. An agency is special when both the end and the means are specific.

Appeal from Circuit Court, Pike County; E. A. Ely, Judge.

Action by Joseph L. Robinson against the Bank of Winslow. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions.

J. W. Brumfield and J. W. Wilson, for appellant. E. P. Richardson, A. H. Taylor, V. R. Greene, and Frank Ely, for appellee.

COMSTOCK, J. Appellant, plaintiff below, brought this action against the appellee for the collection of a check drawn on the appellee by one Beasley, payable to appellant, for the sum of $77.65. The

Digitized by Google

complaint was in two paragraphs. A demurrer for wants of facts was sustained to the first paragraph. The cause was tried on the second paragraph, answer, and reply thereto. Upon a trial by the court there was a finding and judgment in favor of appellee for costs. The only error assigned is the overruling of appellant's motion for a new trial. The reasons for a new trial are that the finding and decision of the court are not sustained by sufficient evidence and are contrary to law. The following are the facts shown by the evidence:

On the 28th of March, 1906, one Beasley was indebted to the appellant in the sum of $77.65, evidenced by his promissory note. On said day appellant gave to one Josephine Hawkins, who was, and for six months previous thereto had been, living at appellant's house, a written order, of which the following is a copy: "Mr. Beasley — Sir: I send your note by Miss Hawkins. You will please pay her the money due on the note and oblige me. The amount due is $77.65. I bought some cattle to take next Saturday, and I will need the money to help pay for them. You will confer a great favor if you will send me the money by Miss Hawkins. Yours, J. L. Robinson." Appellant gave this and the note to Miss Hawkins, and requested her to make settlement with Mr. Beasley. The request and note were delivered to said Beasley, and in payment of said note Beasley drew his check on the appellee's bank, payable to the order of appellant. Miss Hawkins presented this check to the bank, and was told by appellee that she would have to sign the appellant's name on the back of the check before it could be paid. She thereupon wrote the name of appellant upon the back of the check and received the money.

The question presented is simply one of agency. Was Miss Hawkins appellant's agent to indorse negotiable paper given in settlement of a debt due appellant? If she was such agent, the appropriation of the proceeds to her own use was a mere breach of trust, and would not affect appellee. In 1 Parsons on Contracts (6th ed.), § 62, the author says: "An agent's acts in making or transferring negotiable paper (especially by indorsement) are much restrained. It seems that they can be authorized only by express or direct authority, or by some express power which necessarily implies these acts, because the power cannot be executed without them." In Meachem on Agency, the author says (at section 382): "If an agent is authorized to accept checks in payment of the demand, he has no implied authority to indorse them and collect the money thereon, and the bank paying the check so indorsed is still liable to the principal for the amount thereof." The learned author cites in footnotes the following cases which support the proposition: Graham v. U. S. Savings Inst., 46 Mo. 186; Robinson v. Chemical Bank, 86 N. Y. 404; Millard v. Rep. Bank, 3 McArthur (D. C.) 54; McClure v. Evartson, 14 Lea (Tenn.) 495; Holtzinger v. Nat. Bank, 6 Abb. Prac. N. S. (N. Y.) 292; Hogg v. Snaith, 1 Taunt. 347.

The check required the bank to pay the sum specified to such person as the payee might direct. The payee did not direct the payment to any one, unless Miss Hawkins was agent for that purpose. Such agency is not inferable from the mere fact that she was his agent in effecting the collection. Graham v. U. S. Savings Inst., supra. Had the check been payable to Miss Hawkins, she would not have acted in violation of her duty in reducing it to money.

Digitized by Google

Walter v. Bennett, 16 N. Y. 250. Agency rests on contract, express or implied. It is general or special. It is special when both the end and the means are specific. The authority in the case at bar was to receive the money; the means, to surrender the note. Had the agent been authorized to accept a check, instead of money, she would not, as we have seen, had authority to indorse it. The law makes it the duty of every one who deals with a special agent to ascertain the extent of the agent's authority before dealing with him; otherwise, he deals with such agent at his peril, and the principal will not be bound by any act which exceeds the particular authority given. Cruzan v. Smith, 41 Ind. 288. Appellee knew the indorsement was written by Miss Hawkins. No diligence was used in ascertaining her authority to act in the premises, although appellant lived only six miles away, and could have been communicated with by telephone.

It is claimed by appellee that Miss Hawkins having been the special agent of appellant to collect the note, and she having received in full payment thereof the check in question, and the appellant claiming to own the check, this ratifies all her acts, including the indorsement by which she received the money. It is true that ratification of an agent's acts with knowledge of the circumstances relates back to the time when such acts were performed, and binds the principal the same as if authority had been originally given. The claim to the check was rather a repudiation of the act complained of than a ratification. He claims to own the check as it came into the hands of Miss Hawkins, payable to him, and which he did not authorize her to transfer.

Cases are cited in the able brief of appellee, the law of which we do not question; but they do not apply to the facts in the case at bar.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

Decision No. 1125.

KINSTON COTTON MILLS v. KUHNE et al.

(Supreme Court, Appellate Division, First Department. December 18, 1908.)

113 N. Y. S. 779.

FACTORS — FACTORS ACT — PROTECTION OF PERSONS DEALING WITH FACTOR — CONSTRUCTION — ACTIONS — INSTRUCTIONS — "SUSPICION" — PLEADING — AMENDMENT OF COMPLAINT — NEW CAUSE OF ACTION.

1. Evidence in an action by the seller of goods against bankers who had made advances to a factor handling the goods to recover for money received by the bankers in collecting from the purchasers of the goods considered, and held to show that defendants made their advances to the factor on the faith of bills of lading made out to the factor, and that under Factors Act (Laws 1830, p. 203, c. 179), § 3, making every factor intrusted with a bill of lading the true owner thereof so far as to give validity to any contract made by such agent with any other person for money advanced upon the faith thereof, the bankers were not liable to plaintiff.

Digitized by Google

2. Factors Act (Laws 1830, p. 203, c. 179), § 3, for the protection of persons dealing with factors, enacts the common-law rule that, where one of two innocent persons must suffer loss from the act of a third person, such loss shall be borne by him who has placed the third person in the position which enabled him to do the act causing the loss, and must be liberally construed.

3. In an action by the seller of goods against bankers who had made advances to factors to whom plaintiff had consigned its goods by bills of lading made out to such factors to recover the proceeds of the goods, an instruction that, if defendants had a "suspicion" that the factors were not the owners of the goods, it was their duty to make inquiry of plaintiff and that defendants were bound by whatever knowledge such inquiry would have elicited, deprived defendants of the benefit of Factors Act (Laws 1830, p. 203, c. 179), § 3, providing that every factor instrusted with any bill of lading shall be deemed to be the true owner thereof, since the essence of a "suspicion" implies the absence of known facts.

4. The complaint in an action by the seller of goods against bankers who had collected the price of the goods after sale by a factor cannot be amended so as to make the action one for conversion or for an accounting.

Appeal from Trial Term, New York County.

Action by the Kinston Cotton Mills against Percival Kuhne and others. From a judgment for plaintiff, defendants appeal. Reversed. Argued before PATTERSON, P. J., and LAUGHLIN, HOUGHTON, McLAUGHLIN, and SCOTT, JJ.

George T. Hogg, for appellants. Edwin Blumenstiel, for respondent.

SCOTT, J. The defendant appeals from a judgment entered upon a verdict. The action is, or was before the amendment of the complaint hereinafter referred to, one for money had and received, and arose upon the following state of facts: The plaintiff is a foreign corporation engaged in the manufacture of cotton yarns. The defendants are bankers in the city of New York. The English-Greene Company was a corporation engaged in the business of buying and selling cotton yarns either as commission merchants for the manufacturers or as middlemen buying from the manufacturers and selling to consumers. In which capacity it acted with reference to the transactions out of which this action arose is one of the disputed questions of fact. On January 24, 1904, the defendants entered into an agreement with the English-Greene Company to make advances to the latter upon sales made by them. This agreement seems to have been a renewal, with some modifications, of a former contract of similar tenor. It provided, in substance, that the English-Greene Company might present to defendants invoices of goods sold to customers, made payable to defendants, with shipping proofs attached. If acceptable and accepted by defendants, they agreed to collect the amount of the invoices, to bear one-half the loss in case the customers should fail, and meanwhile to advance to the English-Greene Company not less than eighty per cent. of such invoices, charging interest upon such advances. There was an alternative provision, which does not enter into the present case, under which defendants agreed upon certain conditions to take up what are known as "mill drafts" drawn upon and accepted by the English-Greene Company. A considerable business was done

Digitized by Google

between the English-Greene Company and the defendants; the advances by the latter amounting at times to as much as $30,000. On January 18 and 19, 1904, following upon a correspondence between plaintiffs and the English-Greene Company, two orders were given by the latter company to plaintiff, which express the final result of their negotiations. The first of these orders reads as follows.

"No. 489. January 18, 1904.

"Kinston Cotton Mills, Kinston, N. C.: We confirm our order for 10,000 lbs. 20-1 Cones, Twist Hosiery, frame spun, Foster wind. Price 24-25 cents per lb. Terms less 2% and 5% 10 days. F. O. B. Philadelphia. Delivery 3,000 to 4,000 lbs. weekly at once. Kindly acknowledge receipt of this confirmation by signing and returning detachable slip and oblige,

"Yours very truly, English-Greene Co.

"Per James E. Mulgrew, Order Clerk.

"Approved by J. H. English, Manager Department."

The second order was similar in all respects except as to the amount, description, and price of the goods ordered. A number of shipments were made under these orders. There are involved in this action five shipments which were made under the first order and eight shipments made under the second. Pursuant to instructions given by the English-Greene Company, the bills of lading for twelve of these thirteen shipments were made out to defendants; the thirteenth being made out to the English-Greene Company. All of the bills of lading were, however, forwarded by plaintiff to the English-Greene Company, together with an invoice, which was in each case in the following form:

"Kinston, N. C., Feb'y 3, 1904.

"English-Greene Co. New York City, N. Y., Bought of Kinston Cotton Mills, Spinners of Knitting Yarn.

"Order No. 491.

"Shipped to Knauth, Nachod & Kuhne, Orwigsburg, Pa.

"Freight prepaid. Net."

Then followed the case, number, weight, price, and discounts.

On various dates between February 4 and 14, 1904, the English-Greene Company pledged to defendants under its contract with them invoices against customers to whom it had sold yarns shipped by plaintiff pursuant to the aforesaid orders, said invoices representing sales aggregating $2,771.87. These invoices were at somewhat lower prices than those at which the goods had been shipped by plaintiff; the reason being that the English-Greene Company had sold the goods before ordering them from plaintiff in the expectation of filling the orders with goods from another mill, which had, however, refused to deliver them. On some date prior to February 16, 1904, the plaintiff had drawn a draft on the English-Greene Company for $1,500 on account of the shipments made under the aforesaid orders, and on said February 16th plaintiff drew a further draft on the English-Greene Company on account of said shipments. Neither of these drafts were paid. On February 19, 1904, plaintiff sent to defendants a statement of account for the goods shipped to its order on request of the English-Greene Company, and requested payment of the same. Defendants replied, returning the account, and disclaiming all liability to plaintiff

Digitized by Google

therefor. The plaintiff afterward sued the English-Greene Company and recovered judgment for the amount of the shipments under the foregoing orders, for which bills of lading had been made out to said company. On March 18th proceedings in involuntary bankruptcy were instituted against the English-Greene Company. In those proceedings the plaintiff verified and filed two claims against the English-Greene Company, one for the value of the goods for which bills of lading were made out to that company, and one for the value of the goods for which bills of lading were made out to defendants; the later being the same claim sought to be recovered in this action. Defendants made efforts to collect the amounts due upon the invoices pledged to them by the English-Greene Company, but were largely unsuccessful, being able to collect only about thirty per cent. of the face value; the failure to collect being apparently due, not to the insolvency of the purchasers, but to the fact that many of them held valid counterclaims or offsets against the English-Greene Company. Finally, treating the accounts as having been pledged to them, defendants sold the accounts at auction for an insignificant sum. It is plain at the outset that it is very important to ascertain whether he plainiff sold the goods to the English-Greene Company on credit, or whether, as is now claimed, it merely consigned them to the English-Greene Company for sale, as factor or commission merchant, retaining the title in itself. If the transaction constituted a sale on credit, the plaintiff would, of course, have no cause of action against defendants. The jury found on this question in plaintiff's favor, although it must be conceded that the evidence would at least have been consistent with a contrary finding. The orders given by the English-Greene Company were such as might be given by any purchaser, and contain no suggestion that the English-Greene Company is acting merely as a selling agent for plaintiff. Payment was to be made to plaintiff by the English-Greene Company in ten days, and not when the latter company should have sold the goods and collected the proceeds, as would have been the natural agreement if the relation had been merely one of agency. The invoices made out by plaintiff to accompany each shipment represent the goods as having been "bought" by the English-Greene Company from plaintiff, and plaintiff's treasurer testified:

"The Kinston Cotton Mills looked for payment of these sales to the English-Greene Company. As the goods were shipped, the English-Greene Company was charged on the books of the Kinston Cotton Mills. Previous to that the order of the English-Greene Cmpany was entered in an order book, so that we had a record of the order. When shipments were made, the English-Greene Company was charged with the amount of each shipment. It was so entered in our shipping book and the price per pound was entered before the amount was figured out. The English-Greene Company appeared on the books of the Kinston Cotton Mills as its debtor. The Kinston Cotton Mills looked to the English-Greene Company for payment of the account."

He also testified:

"At that time, within the well-recognized custom of the trade, the Kinston Cotton Mills did not look towards the ultimate purchaser of the yarn, but looked towards the English-Greene Company."

Digitized by Google

Reading this testimony in connection with the orders and the invoices, strong ground is afforded for believing that the transaction amounted to a sale. It is true that the treasurer also says:

"The Kinston Cotton Mills expected that the goods were already sold. The understanding was from the telegrams and letters that the yarn had been sold for our account."

The telegrams and letters are in evidence; and, while they indicate that the English-Greene Company would not order yarns until it had itself procured an order therefor, there is nothing to indicate that it was acting merely as a sales agent for plaintiff. It does appear in the orders that there is to be an allowance of five per cent. "commission," which would be an appropriate word to use if the goods were consigned for sale, and apparently inappropriate if the transaction was a sale outright. It was testified to, however, that this allowance of commissions was a method in vogue for determining the net price, and that the same commission would be allowed if the sale had been made outright to a retailer, but not if made to a knitter or consumer. It certainly was the intention of plaintiff to confer upon the English-Greene Company such complete possession and power of disposition as was necessary to enable it to sell and deliver the goods to a purchaser, and in such case it is conceded that the plaintiff would look only to the English-Greene Company for payment, and could assert no claim therefor against the purchaser. It may be that between the plaintiffs and the English-Greene Company it was understood that the latter acted only as a factor, and not as a purchaser on credit, but it is clear that a stranger, knowing nothing of their relations except what was to be derived from the bills of lading and invoices, might be led to honestly believe that the English-Greene Company were purchasers upon credit to whom title to the goods was transferred. This is what the defendants claim they were led to believe, and did believe, and they claim the right to shield themselves behind what is known as the "Factors Act," which so far as applicable reads as follows:

"Every factor, or other agent, intrusted with any bill of lading, custom house permit or warehouse keeper's receipt for the delivery of any such merchandise . . . shall be deemed to be the true owner thereof so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced . . . upon the faith thereof." Chapter 179, p. 203, § 3, Laws 1830; 2 Birdseye's Rev. Stat. (3d ed.), p. 1415, § 1.

This statute has been much discussed by the courts in this State, and is deemed to be one to be liberally construed. Its purpose is to make certain and apply to commercial transactions the general common-law rule that, where one of two innocent persons must suffer loss from the act of a third person, such loss shall be borne by him who has placed the third person in the position which enabled him to do the act causing the loss. Cartwright v. Wilmerding, 24 N. Y. 521; Blydenstein v. N. Y. Security & Trust Co., 67 Fed. 469, 15 C. C. A. 14. Substantially this statute left the owner to use his precautions when he selected his factor, thereafter leaving him to be responsible for the acts of his agent, and protecting a bona fide third person in any transaction fairly effected with the apparent owner. Cartwright v. Wilmerding, 24 N. Y. 532. Following the terms of the statute, we

Digitized by Google

find that the English-Greene Company, as agent of plaintiff, was "intrusted with the possession of the bills of lading for the delivery of" the yarn. These bills of lading were in every case sent to them. It is true that they were in all cases, save one, made out to defendants as consignees, but this was done at the request of the English-Greene Company. and, so far from taking the case out of the statute, this circumstance served rather as a warning and intimation to plaintiff that the English-Greene Company were dealing with the property and perhaps obtaining advances thereon, for the treasurer of the plaintiff testified:

"At the time that the Kinston Cotton Mills had he name of Knauth, Nachod & Kuhne put upon certain bills of lading, I supposed that they were connected in some way with the English-Greene Company. I didn't know in what way. I didn't presume that they were the purchasers of the goods which were shipped or marked for them. I did not expect that they were. I did not know them as users of cotton yarn. . . . My expectation was that they had some financial connection with the English-Greene Company, but I did not know what it was."

The plaintiff therefore intrusted the English-Greene Company with the possession of bills of lading, made out to them or their nominees, for the delivery of the goods. Thus far the transaction comes clearly within the statute. Were the advances made "upon the faith thereof?" These words have received judicial construction. "I have therefore no doubt that 'on the faith thereof,' at the end of the third section of the New York Factors Act, means on the faith of the possession by the factor of the goods, or their evidence of title previously mentioned therein, with the owner's consent; that 'on the faith' means relying on them as evidences of authority to make the disposition made by the contract, in the absence of evidence or notice of anything to the contrary; that the mere notoriety or avowal of a person's business being only that of a factor is no proof of the precise authority of such factor in a particular case, nor is it a fact which would put the person dealing with such factor upon inquiry as to the precise nature of his authority, when that precise nature is immaterial, or make him assume at his peril the duty of proving it." Pegram v. Carson, 10 Bosw. (N. Y.) 505. See, also, Cartwright v. Wilmerding, supra; N. Y. Security & Trust Company v. Lipman, 157 N. Y. 551–562, 52 N. E. 595. That the defendants in fact made their advances upon the faith of the bills of lading is not to be doubted.

The next question is whether they had knowledge or notice that the true title was in plaintiff and that the English-Greene Company were forbidden to obtain advances thereon. Of actual knowledge or notice there is no proof. The court charged the jury that, if they found that defendants had sufficient facts at the time they made advances on said goods to arouse their suspicion as to whether or not the English-Greene Company were the owners of the goods or not, then it was the duty of the defendants to inquire of the plaintiff whether the plaintiff had any interest in said goods, and that the defendants were bound by whatever knowledge such inquiry would have elicited. This we think placed upon defendants a burden which the law does not warrant, and which, if sustained, would entirely nullify the purpose for which the factors act was passed. The essence of a "suspicion"

Digitized by Google

is that it is without known facts to support it, and in every case where a person has apparent ownership of goods either through actual possession, or the possession of the muniments of title, there is room for a "suspicion" that some other person may have an interest therein. Even under the original English act which was less liberal than our present act because it could not be availed of except by showing that the lender did not know that the factor was not the true owner, and thus cast the burden upon him of showing his lack of knowledge, Lord Tenterden said:

"A person may have knowledge of a fact either by direct communication or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of these ways is enough, I think, to exclude a party from the benefit of the provision of the statute. Slight suspicion I think will not." Evans v. Truman, 1 Moody & R. 10.

In that case he left it to the jury to say whether the circumstances were such that a reasonable man and a man of business, applying his understanding to them, would know that the goods did not belong to the pledgor. It was the duty of the plaintiff who had intrusted the English-Greene Company with the indicia of apparent ownership to take steps to protect themselves, especially after they had been advised by the request to consign them to defendants that the English-Greene Company were dealing with defendants with reference to the goods, and that defendants were not consumers, but bankers. Whatever duty of diligence there was in the case rested on plaintiff, not upon the defendants, who in the absence of notice or knowledge were entitled to rely upon the documentary evidence.

Another error was committed. The action, as has been said, was one for moneys had and received; its theory being that defendants had received plaintiff's goods and collected the proceeds of their sale, the purpose being to collect from defendants the amounts which they had received for the goods. It appeared upon the trial that defendants had been able to collect only a small proportion of the amount for which the goods were sold. Thereupon plaintiff was permitted to amend its complaint. The language of the amendment is a little obscure, but it was apparently intended and understood as changing the cause of action from one of moneys had and received into one for conversion or perhaps for an accounting, so that plaintiffs were permitted to recover for the whole price for which the goods were sold, and not alone for the amounts they were able to collect. If this was the effect of the amendment, and upon no other theory can the judgment for the whole value of the goods be sustained, it was clearly one which the trial court had no power to make, for it completely changed the form of action, raising different issues and calling for different proofs.

Upon the complaint as originally framed, the plaintiff could recover, in any event, only what the defendants had actually collected. It was that claim which the defendants were called upon to meet. Upon the amended complaint many other elements were involved which called for entirely different proofs. Our attention has been called to other alleged errors. Since there must be a new trial it will not be necessary to consider them.

Digitized by Google

For the reasons above stated, the judgment must be reversed and a new trial granted, with costs to the appellant to abide the event. All concur.

Decision No. 1126.

JOHNSON COUNTY SAVINGS BANK v. KRAMER.

(Appellate Court of Indiana, Division No. 1. November 24, 1908.)

86 N. E. 84.

APPEAL AND ERROR — ASSIGNMENTS OF ERROR — SUFFICIENCY — BILLS AND NOTES — NATURE OF INSTRUMENT — DRAFT OR NOTE — DRAFTS — ACCEPTANCE — LAW GOVERNING ACTION ON DRAFT — DEFENSES — WANT OF CONSIDERATION.

1. An assignment that "the court erred in overruling the demurrer to the second and third paragraphs of the" answer is sufficient to review a ruling overruling generally the demurrer, which was directed to the paragraphs severally, though to uphold the assignment both paragraphs must be found insufficient.

2. An instrument, dated in Iowa, directing defendant to pay a specified sum one year after date to be charged to the drawer's account, and accepted by defendant in Indiana, is a foreign bill of exchange and not a note.

3. An acceptance of a foreign draft in Indiana is governed by the laws of that state.

4. In a suit on a draft brought by an indorsee against the acceptor, it is no defense that the drawer misrepresented the value of the goods in part payment of which the draft was drawn; and refused to take them back; that the acceptor had paid more than they were worth; and that the drawer broke its agreement that it would buy back the goods remaining on hand if the retail sales did not equal the purchase price within a specified time, to his damage in a sum exceeding the amount of the draft; the indorsee not being connected with or affected by such matters.

Appeal from Superior Court, La Porte County; Harry B. Tuthill, Judge.

Action by the Johnson County Savings Bank against Leonard G. Kramer. From a judgment for defendant, plaintiff appeals. Reversed, with instructions.

M. R. Sutherland and R. N. Smith, for appellant. J. F. Gallaher, for appellee.

MYERS, J. Appellant brought this action against appellee, alleging in substance that a partnership composed of Milbert F. Price and Lewis E. Lyon, doing business at Iowa City, Iowa, under the firm name of the Puritan Manufacturing Company, on April 15, 1904, at its place of business in said Iowa City, drew in due course its draft or bill of exchange, sued on in this action, upon the appellee, as well as three other drafts or bills of exchange, each for $95, due in three, six, and nine months after date, and forwarded them to the appellee for his acceptance in writing; that the appellee received said drafts or

Digitized by Google

bills of exchange and accepted them in writing by signing his name on the face of each, "L. G. Kramer," and delivered them at said Iowa City to said Puritan Manufacturing Company, which in due course, May 21, 1904, in good faith and for a valuable consideration to it paid by the appellant, indorsed and delivered said drafts or bills of exchange to the appellant, "who is now and has been the owner of the draft or bill of exchange sued upon in this action ever since the time of said indorsement." A copy of said draft or bill of exchange, and the acceptance of the appellee written upon the face thereof, and the indorsement of the Puritan Manufacturing Company to the appellant on the back thereof, were exhibited with the complaint as follows:

"Puritan Mfg. Company. No. ———.

"Iowa City, Ia., April 15th, 1904.

"Twelve months after date pay to Puritan Mfg. Company, or order, Ninety-five Dollars, $95.00. Value received and charge to account of

"Puritan Mfg. Company,

"Per M.

"To L. G. Kramer, Michigan City, Ind."

"Customer's acceptance: Accepted, L. G. Kramer (Customer's Signature)."

"Pay Johnson Co. Savings Bank, Iowa City, Iowa. Puritan Mfg. Co."

"Pay any Bank or Banker or order; Johnson County Savings Bank,

"Iowa City, Iowa, William A. Fry, Cashier."

The complaint further showed that when the draft or bill of exchange here in question became due and payable it was presented to the appellee for payment through the First National Bank of Michigan City, Ind., and payment was refused by the appellee. The complaint sets forth certain alleged statutes of Iowa, and contains averments concerning the same; that the instrument sued upon is long past due and wholly unpaid. The appellee answered in three paragraphs, a general denial, and two affirmative paragraphs. A demurrer to the second and third paragraphs of answer was overruled. The demurrer, in so far as it is material, was as follows: "Now comes the plaintiff in the above-entitled cause and demurs, separately and severally, to the second and third paragraphs of defendant's answer, on the following grounds, first, that neither of said paragraphs states facts sufficient," etc. The order book entry showing the court's action and the appellant's exception is as follows: "Which demurrer is by the court overruled, to which ruling of the court said plaintiff by counsel excepts." It is assigned here that "the court erred in overruling the demurrer to the second and third paragraphs of the defendant's answer to the amended complaint." It is contended that no question is presented by this assignment.

The demurrer is addressed to the paragraphs of answer separately and severally. The record shows that the court overruled the demurrer without referring to the separate paragaphs, and that the exception of the appellant to this action of the court was likewise general. The assignment of error is not addressed to the action of the court with reference to the paragraphs separately, but is addressed generally to the overruling of the demurrer.

Certain cases cited by the appellee have been overruled, and it is said that such a general exception to such a general ruling upon a

Digitized by Google

demurrer addressed to the paragraphs of a pleading separately is a sufficient exception as to such ruling upon each of the paragraphs separately considered. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524; City of Decatur v. McKean, 167 Ind. 249, 78 N. E. 982; Bessler v. Laughlin, 168 Ind. 38, 79 N. E. 1033; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418. While the ruling upon the several paragraphs might have been assigned separately in this court, yet under the recognized practice the assignment made in this case is allowable, though it will be necessary for the upholding of that assignment to determine that both paragraphs embraced in the demurrer were insufficient. Black v. Thompson, 136 Ind. 611, 36 N. E. 643; Moore v. Morris, 142 Ind. 354, 41 N. E. 796; Ketcham v. Barbour, 102 Ind. 576, 26 N. E. 127; Sounders v. Montgomery, 143 Ind. 185, 41 N. E. 453.

In the second paragraph of answer it was alleged in substance that the draft sued on was accepted by the appellee at Michigan City, Ind.; that it was drawn for the payment of certain goods sold by the Puritan Manufacturing Company to appellee under a written contract exhibited with the answer; that certain representations were made as to said goods; that appellee purchased the same upon such representations; that they were not as represented; that if said goods had been as represented they would have been of the value of $380; that they were not worth more than $200; that appellee had paid said manufacturing company for said goods $270; that as soon as he learned of the valueless character of the goods he notified said company that he would return the same to it, which return was refused and forbidden by said company; that he has at all times been ready and willing to deliver said goods to said company, etc.; that the draft sued on by the assignee of that company was for the amount claimed to be due from appellee for said goods over and above the $270 already paid.

In substance, the third paragraph of answer showed that the draft in suit was drawn against appellee by the Puritan Manufacturing Company and accepted at Michigan City, Ind., and assigned to the appellant; that it represented a partial payment for goods purchased by appellee from that company under the written contract exhibited; that the amount to be paid for the goods was $380, and that the company at the time of the sale of the goods represented them to be merchantable, and as an inducement to the appellee to purchase them guaranteed that, if the retail sales of said goods in the appellee's store did not equal the purchase price of $380 by the expiration of twelve and one-half months from the date of the invoice, said company would buy back for cash at the original invoice price all of said jewelry then remaining in appellee's hands. It is averred that said sales in twelve and one-half months did not equal $380; that appellee performed all of his part of said contract; that said company failed and refused to comply with said contract on its part, and refused to buy back the goods as it had agreed to do, whereby appellee was damaged in the sum of $350; that said goods remaining in his hands at the invoice price amounted to $353, which appellee had at all times been willing to deliver to said company upon the payment to him of the invoice price, etc., and demanding that his damages, $350, be set off against appellant's claim.

Digitized by Google

The writing in suit is to be regarded not as a promissory note, but as a foreign bill of exchange. Appellee's contract of acceptance of the bill was made in this State, and is governed by the laws of this State. Burnheisel v. Field, 17 Ind. 609; Payne v. Albany, etc., Bank, 3 Ind. App. 214, 28 N. E. 432; Nicely v. Commercial Bank, 15 Ind. App. 563, 569, 44 N. E. 572, 57 Am. St. Rep. 245; Daniel, Neg. Inst., §§ 7, 27, 867.

In Spurgin v. McPheeters, 42 Ind. 527, it was held that, in a suit by the payee against the acceptor of a bill of exchange, the latter could not avail himself of a want of failure of consideration as between him and the drawer (a third person), or of a set-off in favor of such defendant against such drawer.

In Hinkley v. Fourth National Bank, 77 Ind. 475, it was held that the element of fraud being absent, in an action by an indorsee of a bill of exchange against the acceptor, the acceptor cannot defend by merely showing that he received no consideration, but the acceptor must also show that there was no consideration between the indorsee who sues and his indorser. See, also, Harger v. Worrall, 69 N. Y. 370, 25 Am. Rep. 206; Galvin v. Meridian National Bank, 129 Ind. 439, 28 N. E. 847; Heuertematte v. Morris, 101 N. Y. 71, 4 N. E. 1, 54 Am. Rep. 657; Hoffman v. Bank of Milwaukee, 12 Wall. 181, 20 L. Ed. 366.

In First National Bank v. Ruhl, 122 Ind. 279, 23 N. E. 766, which was an action upon commercial paper by a holder through indorsement, it was held that an answer pleading want of consideration was bad because it did not show that the plaintiff was not a purchaser for value and in good faith.

Whatever might be said of answers setting up the matters stated in the second and third paragraphs, if the action was one brought by the payee and drawer of the bill against the acceptor, they cannot be said to have presented any defense to the action against the acceptor brought by the indorsee, nor in any manner connected with or affected by such matters.

Judgment reversed, with instructions to sustain appellant's demurrer to the second and third paragraphs of answer.

Decision No. 1127.

DEHOUST v. LEWIS.

(Supreme Court, Appellate Division, Second Department. October 16, 1908.)

112 N. Y. S. 559.

BILLS AND NOTES — CHECKS — PRESENTMENT FOR PAYMENT — "REASONABLE TIME" — INDORSEMENT — PAYMENT — BURDEN OF PROOF — ACTION ON CHECK — EVIDENCE.

1. Under Negotiable Instruments Law (Laws 1897, p. 756, c. 17), § 322, requiring presentment of checks for payment within a reasonable time, where a check drawn on October 11, 1907, was received through the mail on October 12th, a "reasonable time" for presentation expired at the close of business on October

Digitized by Google

13th, under the general rule that a reasonable time for presentation of a check ends with the next day after it is dated.

2. That the payee of a check indorsed it to a third person did not extend the reasonable time for presentment for payment as between drawer and payee.

3. Where, in an action on a pre-existing debt, defendant pleaded payment by a check which was not presented for payment until after the closing of the drawee bank, the burden was on defendant to show, not only delivery and acceptance of the check in payment, but loss to him through laches in presenting the check.

4. In an action on a check, which was unpaid because of the payee's failure to present the same within a reasonable time and until after the closing of the bank, the burden is on the plaintiff to show that the drawer has suffered no loss by such laches.

5. Where, in an action on a pre-existing debt, defendant pleaded payment by check, and showed delivery and acceptance of the check, and that for twelve days thereafter all his checks had been paid, and he had throughout such period and up to the closing of the bank, before the check was presented, sufficient funds to meet the same, he sufficiently established loss by the payee's laches; it being presumed from the closing of the bank, in the absence of other proof, that it was insolvent, and that its insolvency continued.

Appeal from Municipal Court, Borough of Brooklyn, Third District.

Action by Louis Dehoust against Samuel Lewis. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

David Siegelman, for appellant. Charles Burstein, for respondent.

JENKS, J. This is an appeal from a judgment of the Municipal Court dismissing the complaint on the merits. The action is for goods sold and delivered. The answer alleged delivery of a check for the full amount of the claim. At the trial the plaintiff rested on the pleadings. By admissions and undisputed evidence the defendant showed that he drew such a check in favor of the plaintiff on October 11, 1907, dated that day, on the Borough Bank, which was received by the plaintiff on the morning of October 12, 1907; that the check was deposited by an indorsee in the First National Bank on October 23, 1907; and that the parties and the Borough Bank reside in the same borough of the city of New York. The plaintiff did not offer any testimony in rebuttal, and at the close of the case each party moved for judgment.

Section 322 of the Negotiable Instruments Law (Laws 1897, p. 756, c. 17) provides:

"A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

The court was justified in the conclusion that the check was not presented within a reasonable time, for the general rule in such a case as this is that the reasonable time ends with the next day after the date of the check. Eaton & Gilbert on Commercial Paper, § 167; Wood's Byles on Bills 19; Smith v. Janes, 20 Wend. 192, 32 Am. Dec. 527, cited in Carroll v. Sweet, 128 N. Y. 19, 22, 27 N. E. 763, 13 L. R. A. 43. Even although the check was not received through

Digitized by Google

the mail until October 12th, nevertheless the reasonable time for presentation would only be extended until the expiry of October 13th. The fact that the payee indorsed the check to a third party did not extend the period of reasonable time, as between the drawer of the check and the payee. Daniel on Negotiable Instruments, § 1595, and cases cited; Carroll v. Sweet, supra. The mere delay in presentation of the check for payment did not discharge the drawer, save to the extent of his loss caused by it. Section 322, Negotiable Instruments Law; Carroll v. Sweet, supra; Eaton & Gilbert on Commercial Paper, § 167, citing Story on Promissory Notes, § 498.

As this action was upon the pre-existing debt for which the check was delivered, the defendant, pleading payment, must show delivery, acceptance, and loss to him through the laches in presentation of the check. Daniel, Neg. Inst., § 1588, citing Syracuse, B. & N. Y. R. R. Co. v. Collins, 3 Lans. 29, affirmed 57 N. Y. 641. The burden would have been upon the plaintiff to show that the drawer had not suffered loss by the laches if the action had been upon the check. Little v. Phenix Bank, 2 Hill, 425; Daniel, supra. I think, however, that the defendant sustained the burden, because he showed delivery, acceptance, that the bank closed its doors, but only twelve days after the receipt of the check by the payee, that all of his other checks had been paid, and that he had throughout the time intervening the drawing of the check and the closing of the bank, and at its close, sufficient funds to meet the check. The closing of the doors of the bank, without any other circumstances to refute such a conclusion, may well be taken as an act of insolvency, though such an act is not conclusive. People v. Oriental Bank, 124 App. Div. 741, 109 N. Y. Supp. 509. And the presumption of insolvency continues. Lawson on Presumptive Evidence, p. 172, and cases cited. After the evidence put in by the defendant, it was incumbent upon the plaintiff, if he could, to meet it; otherwise, the defendant's case justified the judgment pronounced by the court. The check is, however, still extant, and in the hands of the plaintiff, and may be presented at any time to the bank upon which it is drawn.

The judgment is affirmed, with costs. All concur.

Decision No. 1128.

GRAHAM v. SMITH.

(Supreme Court of Michigan. December 14, 1908.)

118 N. W. 726.

BILLS AND NOTES — RIGHTS ON INDORSEMENT — "HOLDER IN DUE COURSE" — BONA FIDE PURCHASER — COLLATERAL SECURITY — PRE-EXISTING DEBT — "VALUE" — "HOLDER FOR VALUE."

1. Where there was no fraud in the inception of a note, and the holder had no knowledge, actual or constructive, of alleged fraud which induced the payee to indorse and transfer it, but received it in good faith, the holder was a holder in due course if he was a holder for value.

Digitized by Google

2. Prior to the Negotiable Instruments Act, Pub. Acts 1905 p. 389, No. 265, a person holding a note as collateral security for an existing debt was not a holder for value.

3. Negotiable Instruments Act, Pub. Acts 1905, p. 94, No. 265, § 27, provides that "value" is any consideration sufficient to support a simple contract, and that an antecedent or pre-existing debt constitutes value. Section 29 (page 395) provides that, where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. Held, that a person holding a note as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him.

Error to Circuit Court, Bay County; Chester L. Collins, Judge.

Action by Andrew J. Graham against Henry B. Smith. There was a directed verdict for plaintiff and defendant brings error. Affirmed.

Argued before Grant, C. J., and BLAIR, HOOKER, MOORE, and McALVAY, JJ.

M. L. Courtright, for appellant. Stoddard & McMillan, for appellee.

BLAIR, J. Plaintiff brought suit against defendant Smith, as maker, and Chas. H. Hill, as indorser, of the following promissory note: "$2,500.00. Bay City, Mich., Jan. 11, 1906. Six months after date I promise to pay to Charles H. Hill, or order, twenty-five hundred dollars, at First National Bank, of Bay City, Mich., value received, with interest at the rate of six per cent. per annum. Henry B. Smith. No. ———. Due 7-11-6." Said note is indorsed upon the back thereof as folows: "Charles H. Hill. Fred A. Bangs." In consequence of fraudulent representations by one of its officers as to the mining property and the purpose for which the note was obtained and would be used, Hill was induced to and did indorse the note in blank and deliver it to such officer for the La Fronteriza Mining Company in part payment for shares of its stock. Prior to the transfer of the note, Fred A. Bangs, president; James A. McCoy, vice-president and general manager, and Wm. S. Barbee, treasurer, borrowed of plaintiff, on account of the mining company, on their joint and several note, $5,000, which was credited to the company on plaintiff's books and checked out by the company. The note in suit was indorsed in blank and delivered by Mr. Bangs to plaintiff, as plaintiff claims, in payment of an equivalent amount of the company's indebtedness, but, as defendant contends, as collateral security therefor. Mr. Bangs, who was called by the defendant, testified: "Q. Was any statement made to Graham & Sons which in any manner might cause them, or tend to cause them, to suspect the entire good faith of the transaction? A. No, sir; because I knew nothing about it except that it was in good faith. Q. The Smith-Hill note was received by you and turned over to Graham & Sons to the account of the mining company in the regular course of business of the company. A. Yes, sir. Mr. Courtright: I do not claim that Mr. Bangs was a party to any fraud or wrongdoing whatever. Witness: The original note was signed by Barbee, McCoy, and myself. Mr. Barbee's name was left off the present note because in the meantime he resigned as treasurer and left the company, and, being for company indebtedness, it was signed by officers of the company." Plaintiff discontinued his suit

Digitized by Google

as against Hill and proceeded to judgment against Smith upon a directed verdict. As stated by counsel for defendant in their brief: "The only question in the case therefore is whether, under the evidence and the provisions of the Negotiable Instruments Law, Act No. 265 of the Public Acts of 1905, plaintiff is a holder in good faith and for value. The defendant claims that he is not such a holder, and that the court should have at least left the question to the jury, for the reason that it was for the jury to determine this question under the evidence as plaintiff parted with nothing, did not extend any credit, and in no way altered his condition by taking the note, and there was no agreement that it was taken in extinguishment of any part of the indebtedness represented by the Bangs-McCoy note; so that in fact no part of the Bangs-McCoy indebtedness was legally discharged."

There was no fraud in the inception of the note. It was given for an actual indebtedness and was unimpeachable between the maker and payee. The fraud alleged arose on the sale of the shares of mining stock. The evidence conclusively establishes the fact that plaintiff had no knowledge, actual or constructive, of any fraud in connection with the note, and that he received it in good faith. If therefore plaintiff was a holder for value, he was "a holder in due course," as held by the trial judge, and entitled to recover. If, as contended by defendant's counsel, the plaintiff received the note as collateral security for an existing debt, and the Negotiable Instruments Act (Pub. Acts 1905, p. 389, No. 265) has introduced no change in the law as to such instruments, plaintiff was not a holder for value. Burroughs v. Ploof, 73 Mich. 607, 41 N. W. 704; Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051. Section 27 of the act is as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." Section 29 provides: "Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien." We are of the opinion that it was the intention of the legislature to change the rule theretofore prevailing in this State "so that any person to whom a negotiable security has been pledged as collateral would be a holder for value to the extent of the amount due him." Payne v. Zell, 98 Va. 294, 36 S. E. 379; Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822. See, also, Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042, affirmed without opinion, 173 N. Y. 596, 65 N. E. 1121.

The judgment is affirmed.

Digitized by Google

Decision No. 1129.

J. W. O'BANNON CO. v. CURRAN.

(Supreme Court, Appellate Division, First Department. December 11, 1908.)

113 N. Y. S. 359.

BILLS AND NOTES — FAILURE TO PRESENT AND GIVE NOTICE OF NON-PAYMENT — DISCHARGE OF INDORSER — PRESENTATION AND NOTICE OF NON-PAYMENT — WAIVER BY INDORSER — NEGOTIABLE INSTRUMENTS LAW.

1. Prior to the Negotiable Instruments Law (Laws 1897, p. 714, c. 612) an indorser of a note or the drawer of a draft was not discharged by omission to demand payment and to give notice of non-payment, where the omission could not operate to his injury; but such injury was presumed until it was made to appear that no damage could have resulted, and mere proof of insolvency of the maker and drawer did not excuse the neglect.

2. Negotiable Instruments Law (Laws 1897, pp. 736, 739, c. 612), §§ 130, 160, provide, respectively, that due presentment and notice of dishonor are necessary to charge an indorser. Section 142, subd. 3, and section 180 (pages 738, 742), provide that presentment for payment or notice of non-payment may be dispensed with by waiver. A corporation executed notes, indorsed by defendant, its president, individually. Prior to the maturity of the notes the maker was adjudged a bankrupt, and its property placed in the hands of a receiver; the adjudication being based at least in part upon the written admission of defendant of its inability to pay debts, coupled with a willingness that it be adjudged a bankrupt. Held, that defendant, knowing that the maker could not pay the notes when due, because its property was in the hands of a receiver in bankruptcy, in which he participated, impliedly waived presentment of the notes and notice of dishonor, within the sections of the Negotiable Insrtmuents Law.

Appeal from Special Term, New York County.

Action by the J. W. O'Bannon Company against James M. Curran. A demurrer to parts of the complaint was overruled, and defendant appeals. Affirmed, with leave to defendant to withdraw the demurrer and to answer.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and SCOTT, JJ.

Forsyth Wickes, for appellant. Joseph M. Prsokauer, for respondent.

McLAUGHLIN, J. This appeal is from an interlocutory judgment overruling a demurrer to the second and third causes of action set forth in the complaint. In each case the demurrer was upon the ground that the facts stated did not constitute a cause of action. The second cause of action alleged is to recover upon a promissory note made by the James Freeman Brown Company, a domestic corporation, dated October 12, 1903, and payable three months after date to the plaintiff at 73 Franklin street, New York. It is alleged in sub-

Digitized by Google

stance, with reference to this cause of action, that the defendant indorsed the note, and it was then delivered, before maturity, to the plaintiff, which gave full value therefor, relying on the credit of said indorsement; that before the note became due, and on the 7th of December, 1903, an involuntary petition in bankruptcy was filed against the James Freeman Brown Company, and a receiver appointed; that on the same day the defendant, as president of the company, pursuant to a vote of the board of directors, filed a written admission of its inability to pay debts and a willingness that it be adjudged bankrupt; that it was so adjudged on the 20th of February, 1904; that at the maturity of the note the maker was insolvent, its business suspended, its place of business closed, its property still in the possession of the receiver, and that the note was not paid, of all of which facts the defendant then had actual knowledge; that no part of the note has been paid, except a dividend declared in the bankruptcy proceedings, and that the balance is now due and owing to the plaintiff from the defendant, for which sum judgment is asked. The third cause of action alleged is on another note, and the allegations respecting it are substantially the same.

The appellant contends that no cause of action is stated against him as indorser upon the notes, because it does not appear that they were presented for payment and notice of non-payment given to him. Prior to the enactment of the Negotiable Instruments Law (Laws 1897, p. 719, c. 612) it was held that an indorser of a note or the drawer of a draft was not discharged by an omission to demand payment and to give notice of non-payment, where such omission could not possibly operate to his injury, but such injury was presumed, until it was made to appear that no damage could have resulted; that mere proof of insolvency of the maker and drawer was not sufficient, and would not excuse the neglect. Smith v. Miller, 52 N. Y. 545; Clift v. Rodger, 25 Hun, 39; Commercial Bank of Albany v. Hughes, 17 Wend. 94; Mechanics' Bank of N. Y. v. Griswold, 7 Wend. 165. If this were to be here applied, then it is quite evident, under the facts alleged, the plaintiff would be entitled to recover, because the defendant was in no way prejudiced by the failure to present the notes for payment, or to give him notice of non-payment. The Negotiable Instruments Law, however, provides that due presentment and notice of dishonor are necessary to charge an indorser (sections 130, 160); but either presentment for payment or notice of non-payment may be dispensed with by waiver, which may be express or implied (section 142, subd. 3; section 180), so that the real question here presented is whether the facts show such waiver.

I think they do. Prior to the maturity of the notes the maker had been adjudicated a bankrupt, and the adjudication was based at least in part upon the written admission of the defendant of its inability to pay debts, coupled with a willingness that it be adjudged a bankrupt. It is true the defendant signed this admission in his official capacity as president of the corporation, while he is only liable as indorser as an individual; but as an individual he knew when the notes fell due that the corporation could not pay them, because it had then been adjudicated a bankrupt and all its property was in the hands of a receiver in the bankruptcy proceedings, in which he participated. Under such circumstances the defendant must be deemed to have

Digitized by Google

waived, at least impliedly, within the meaning of the sections of the Negotiable Instruments Law above referred to, presentment of the notes and notice of dishonor. By his consent and with his co-operation it had been rendered impossible for the maker to pay — all of its property being then in custodia legis. This view is also sustained by what this court decided in Moore v. Alexander, 63 App. Div. 100, 71 N. Y. Supp. 420. There Mr. Justice Ingraham, in considering the liability of an indorser where no presentation had been made, said:

". . . It is only when, because of some act of the indorser, the non-payment by the maker and a failure of notice to the indorser cannot possibly operate to the injury of the latter, that the omission is excused. The mere fact of insolvency of the maker is not enough. . . . The fact which would excuse this presentation must, as I understand it, be some act in which the indorser participated, by reason of which the knowledge of the fact that the maker would not pay the bill could be of no benefit to him."

When the notes in question fell due the maker could not pay. The indorser knew it, because he had participated in the act which made it impossible for it to pay; and for that reason a failure to present the notes for payment and give him notice of non-payment could not by any possibility have injured him.

The judgment appealed from, therefore, is affirmed, with costs, with leave to the defendant to withdraw demurrer and answer, on payment of costs in this court and in the court below. All concur.

Decision No. 1130.

TILDEN v. GOLDY MACHINE CO.

(Court of Appeals, Third District, California. September 10, 1908.)

98 Pac. 39.

BILLS AND NOTES — NON-NEGOTIABLE NOTE — BLANK INDORSEMENT — DEMAND — NOTICE — CORPORATIONS — OFFICERS — POWERS — EXECUTIVE COMMITTEE — AUTHORITY OF OFFICERS — DENIAL — ESTOPPEL.

1. One who writes his name on the back of a non-negotiable note to give credit thereto is a guarantor, and is prima facie bound to pay the note on the principal's default, without demand or notice.

2. Where a corporation's charter and by-laws authorized the appointment of an executive committee by the board of directors with all the powers of the board which might be lawfully delegated in the management of the company's business, and to affix the company's seal to all papers requiring it, a resolution designating certain persons as the executive committee, with authority to exercise all the powers of the board in the current business of the company while the board was not in session, conferred authority on the committee to indorse a note for a loan for the corporation's current business.

3. Where a corporation's executive committee indorsed a note for a loan, and the corporation received the money and knowingly used it in its business, it was estopped to thereafter question the committee's authority to make such indorsement.

Digitized by Google

Appeal from Superior Court, Santa Clara County; A. L. Rhodes, Judge.

Action by B. B. Tilden against the Goldy Machine Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

William A. Bowden, Beasley & Fry, and Elmo Lasleretto, for appellant. Jordan & Rowe, Jordan, Brann & Rowe, and E. M. Rea, for respondent.

CHIPMAN, P. J. Plaintiff recovered judgment, from which and from the order denying its motion for a new trial, defendant appeals.

Defendant was sued as guarantor of the following non-negotiable promissory note:

"15.000.00. San Francisco, Cal. March 24, 1905. On demand for value received, I promise to pay B. B. Tilden, the sum of fifteen thousand dollars ($15,000.00) with interest at the rate of three per cent (3%) per annum. William T. Garrett. Witness: H. H. Benedict." Endorsed: "The Goldy Machine Company, per S. N. Goldy, H. F. Emme, Executive Committee."

The court found that the defendant is a corporation duly organized and existing under the laws of New Jersey, doing business at Sunnyvale, Santa Clara county, Cal.; that said Garrett executed and delivered to plaintiff said note, and "that at the time and place of its execution, and as a part of the same transaction, and prior to the delivery thereof," defendant, "by its writing on the back of said note, guaranteed the payment of the same and undertook and promised to pay to said plaintiff the principal sum and interest thereon therein mentioned," and "that said defendant received from plaintiff as a consideration for said indorsement of said note the sum of $10,000, gold coin of the United States, then and there loaned by said plaintiff to said defendant;" that demand for payment had been made upon said Garrett and refused, and the same is now due and owing from defendant to plaintiff.

The principal point made by defendant is that the evidence fails to show that defendant executed the indorsement on the note, and hence the findings are not supported. A preliminary point is made, to wit, that, as the note is not negotiable, "the mere indorsement of the name of the company on the back thereof was not in any sense a guaranty that the company would pay the same." The Supreme Court has decided otherwise. First National Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94, where it was said: "One who writes his name upon the back of a non-negotiable promissory note to give it credit is a guarantor, and is liable prima facie for the payment of the note upon default of the principal, without any previous demand or notice." Briefly stated, the note in question was executed and delivered under the following circumstances: Defendant had agreed to purchase certain land at Sunnyvale, Santa Clara county, on which to erect a manufacturing plant, the title to the land depending upon the completion of certain buildings and the operation of an engine thereon. S. N. Goldy was a director, vice-president, and general manager of the company. He and H. F. Emme had been appointed the executive committee of the company. C. H. Geldert was its secre-

Digitized by Google

tary and also a director. He was also the attorney in fact of B. B. Tilden, payee of the note. W. T. Garrett, its maker, was the agent of the company for the sale of its stock, and actively engaged in promoting the enterprise chiefly by the sale of stock. The company was pressed for money to pay its employees and to meet its engagements, and its stock did not find ready sale. Under these circumstances Goldy persuaded Geldert to make a loan of $10,000 to the company for Tilden, plaintiff here. It was agreed that Garrett should make a note for $15,000, and that the company would indorse it; the avowed object being to avoid a note by the company which might affect its credit when appearing on the books, and injuriously affect the sale of stock. Garrett accordingly executed the note in this non-negotiable form and the executive committee of the company indorsed it as shown. It was delivered to Geldert as Tilden's attorney in fact, who hypothecated securities belonging to Tilden with the Garden City Bank & Trust Company of San Jose, obtaining $10,000 thereon, and paid this money directly to the Goldy Machine Company, which used it in its business. At the time of the execution of the note Garrett entered into an agreement with the company by which he subscribed for $15,000 of its stock, the proceeds of the sale of which were to go, first, to pay the $10,000 furnished the company and take up the Tilden note, and $5,000 was to go to Garrett as commissions for the sale of the stock — a hard bargain for the company, but advisedly entered into under stress of circumstances. Some importance is attached to this latter agreement by defendant, and it is claimed that it was part of the transaction for the loan, but the evidence was that neither Tilden nor his attorney in fact was a party to it and never assented to it, but refused to have anything to do with it. The trial court doubtless so considered the fact to be, and so also must we. Demand of payment of the note was made upon Garrett and refused, and hence this suit.

By subdivision 1, section 22, of the company's by-laws, certain powers were conferred upon the board of directors: "(1) To delegate any of the powers of the board in the course of the current business of the company to any standing or special committee, or to any officer or agent, and to appoint any persons to be the agents of the company, with such powers (including the power to subdelegate) and upon such terms as they think fit." It thus appears that the directors were authorized to delegate "any of the powers of the board in the course of the current business of the company." Article 5 of the charter of the company is as follows: "The board of directors are expressly authorized by a resolution passed by a majority vote of the whole board, under suitable provision of the by-laws, to designate two or more of their number to constitute an executive committee, which committee shall for the time being, as provided in said resolution, or in the by-laws, have and exercise all the powers of the board of directors which may be lawfuly delegated in the management of the business and affairs of the company, and shall have power to authorize the sale of the company to be affixed to all papers which may require it." Pursuant to the foregoing provisions of the charter and by-laws, the board of directors on January 16, 1905, duly passed the following resolution: "Resolved: That Messrs. S. N. Goldy and H. F. Emme be and hereby are designated as members of the executive committee

Digitized by Google

with authority to exercise all the powers of the board in the current business of the company while the board is not in session." Acting under its appointment, the executive committee on March 24, 1905, passed the following resolution, as appears from its minutes: "Whereas, in order for the said William T. Garrett to secure the said sum of ten thousand dollars for investment in this company it is necessary for him to draw a note for fifteen thousand dollars in favor of B. B. Tilden, the same to be indorsed by the Goldy Machine Company: Therefore, be it resolved; that considering the necessity of securing this investment the executive committee indorses said note in the name of the company. Upon motion the meeting adjourned. [Signed] S. N. Goldy, H. F. Emme, Executive Committee." The execution of the guaranty indorsement by the executive committee is fully proved, and also that the company received the money paid by Tilden. We do not entertain any doubt but that the authority to indorse the note was conferred upon the executive committee. It seems to us that it was entered into in the course of the current business and in reality it was the obligation of the company as fully appears from the evidence, and not Garrett's, who was but an accommodation maker. Besides, if this be not so, still, under the circumstances attending the transaction, showing among other things that the company received the money and knowingly used it in its business, it is not in a position now to question the authority under which it obtained the money. It is estopped to set up such defense. 10 Cyc. 1067, 1068; Lakestreet Electrical Railroad Company v. Carmichael, 184 Ill. 348, 56 N. E. 373; Main v. Casserly, 67 Cal. 127, 7 Pac. 426; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 Pac. 527.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

Decision No. 1131.

ZIMBLEMAN & OTIS v. FINNEGAN.

(Supreme Court of Iowa. Nov. 19, 1908.)

118 N. W. 312.

BILLS AND NOTES — ACTION — EVIDENCE — CONSIDERATION — QUESTION FOR JURY — PLEADING — COMPLAINT — REPLY — INSTRUCTION — REQUISITES OF CONTRACT — APPEAL AND ERROR — REVIEW — QUESTIONS OF FACT — VERDICT — PRE-EXISTING INDEBTEDNESS — EXTENSION OF TIME — FRAUDS, STATUTE OF — PROMISE TO ANSWER FOR ANOTHER'S DEBT — PROMISSORY NOTE — SUFFICIENCY.

1. A written promissory note imports a consideration.

2. In an action on a note, the only testimony at the time of a motion to direct a verdict for defendant being that the note was executed as defendant's independent obligation, the motion was properly overruled.

3. In an action on a written promissory note, plaintiff was not required to allege a consideration; that being presumed.

Digitized by Google

4. In an action on a written promissory note, plaintiff was not bound to allege the consideration thereof, in reply to defendant's plea of no consideration.

5. In an action on a note, defendant claiming that it was executed on the understanding that the names of others should be added as makers, his defense was sufficiently presented by an instruction that, if the jury believed defendant delivered the note under an agreement that he was signing it as one of the stockholders of a corporation, and that it was to become binding only on the condition that other stockholders also signed, plaintiff could not recover.

6. If there was an understanding between the parties to a note that it was not to become binding on the maker until others had signed it, such understanding would have to be based on a mutual agreement between them, and an understanding by either, not based on an agreement, would not bind the other.

7. In an action on a note, whether it was to become a binding obligation upon the maker until it was also signed by others held for the jury in the trial court.

8. Forbearance to sue upon a present claim, on the extension of time to a debtor, is sufficient consideration for a promissory note, and the extension of time to a debtor by his creditor is a sufficient consideration for a note executed by a third person, if there was an express or implied agreement for such extension.

9. Where a debt is due, and a note is executed by a third party to the creditor, payable at a future day, an agreement by the creditor to extend the time of payment will be implied.

10. Lumber was purchased by a park association, and it being unable to pay for it, and the seller insisting upon payment, defendant, a stockholder in and secretary of the association, signed a note payable in a year, after which the association was not regarded as a creditor, or, if so considered, the time of payment by it was extended. Held, that the extension of the time of payment was a sufficient consideration for the note.

11. A promissory note, executed in consideration of the extension of the time of payment of another's debt, being in writing, and its execution being admitted by the maker, only the sufficiency of the consideration being disputed, the statute of frauds is not involved.

12. In an action on a note, given for a debt of a third party to the creditor, evidence held to show that it was executed under an implied agreement by the creditor to extend the time of payment of the debt then due him.

Appeal from District Court, Boone County; C. G. Lee, Judge.

Action at law upon a promissory note. Defenses, want of consideration, and some other matters, which will be noticed in the body of the opinion. Trial to a jury, verdict and judgment for plaintiffs, and defendant appeals. Affirmed.

Dyer & Hull, for appellant. C. W. Crooks and Harpel, Creighton & Cederquist, for appellees.

DEEMER, J. The action is upon a promissory note for $749.12, dated November 27, 1903, due on or before one year after date, drawing eight per cent. interest, payable to plaintiff and signed by defendant. There was a credit thereon, under date April 17, 1905, of $280, received for the sale of a building and fence. Defendant averred that it was never delivered with intent to make it a binding obligation, that others were to sign before it was to become effective, and that there was no consideration for the note. These were the issues upon which the case was submitted, with the result above

Digitized by Google

indicated. At the conclusion of plaintiff's evidence defendant moved for a directed verdict. This motion was overruled, and of this complaint is made. It is also contended that the verdict is without support in the evidence, and some of the instructions are challenged.

The argument has taken a rather wide range, and much is said in the briefs regardeing the statute of frauds which we do not think is in any manner involved. The testimony tended to show the following with reference to the execution of the notes: Plaintiff is a co-partnership, engaged in the retail lumber business at the city of Boone, and defendant was a stockholder and the secretary of what was known as the "South Side Driving Park Association" in said city. As such officer he ordered a bill of lumber from plaintiff for the driving park association, which bill was delivered to the association. The amount of this bill was $749.12. After the bill was furnished, one of the members of plaintiff firm called on defendant to pay the bill. Defendant said there was no funds with which to pay it, and plaintiff then insisted that defendant make his note for the amount of the lumber bill. The note in suit was accordingly drawn up, signed by defendant, and delivered to Zimbleman, a member of the plaintiff firm. It was then suggested, by one or the other of the parties, that other stockholders of the driving park association should sign the note, and the testimony on the part of the plaintiff is that defendant was to procure the signatures. Zimbleman secured the note from defendant in order to straighten out the account, as he (Zimbleman) was about to leave the State to be gone several months. The note, after delivery to Zimbleman, was left with Otis, the other member of the firm, and defendant was told that he might procure it at any time from Otis to get such signatures as he (defendant) desired to have with him on the note. Finnegan got the note from Otis to obtain other signatures, and it remained with him for about four months. Not having been returned, Otis went to defendant about it, asked if he had obtained the other signatures, and, being informed that he had not, claims that defendant then surrendered the note as his independent obligation. After the note was executed defendant on several occasions asked for time on the note, hoping that the driving park association would be able to pay the bill, but it never became able to do so, and just before the expiration of the time for foreclosing the mechanic's lien, plaintiff demanded payment of the note, and it was then agreed that the mechanic's lien should be foreclosed, and the amount realized thereon credited upon defendant's note. This was done, and the credit appearing upon the back of the note represents the net amount realized on the foreclosure.

Defendant introduced testimony to the effect that the note was not to be binding as his sole and individual obligation, but that the agreement was that the note should be signed by all the stockholders of the driving park association, some ten or twelve in number, before it would be binding and that he (defendant) was simply "to start the note out;" that the note was never signed as agreed, and never became a binding obligation. He further testified that he received no part of the consideration for the note, although he admits that he signed the same because of Zimbleman's statement to him that the driving park association account had to be fixed up.

Digitized by Google

In substance, this is the material evidence in the case, and in view thereof the trial court gave the following instructions to the jury: "If you believe from the evidence that the defendant delivered the note in suit to plaintiff, under an agreement that he was signing the same as one of the stockholders of the South Side Driving Park Association, and that the same was to become binding only upon condition that other stockholders of said association should sign the same, then plaintiff cannot recover in this case. Or if you believe from the evidence that there was no consideration for said note, then the plaintiff cannot recover. The only claim of consideration in the pleadings is that said note was given for the purpose of securing an extension of time for the South Side Driving Park Association, and you are told that, if this was the consideration, it was sufficient. The note, being a written instrument, and in the possession of plaintiff, purports a delivery and a consideration, and the burden is upon the defendant to show, by a preponderance of the evidence, either that there was no delivery or no consideration. On the other hand, if you believe that the defendant was a stockholder and officer of the South Side Driving Park Association, and that said association was without funds, and in order to extend the time of payment of said claim, and prevent the plaintiffs from immediately enforcing their claim against the South Side Driving Park Association, the defendant delivered the note to the plaintiffs, intending the same as his obligation, but that it was understood and agreed that the defendant might have the privilege of securing other names to share the liability, then the note would be a binding obligation upon him, and the plaintiff would be entitled to recover. You are told that if the defendant delivered the note to the plaintiffs without an agreement that other names should be secured to the same before it should be binding, then the law presumes he intended it as his own obligation." Contention is made that the trial court was in error in not sustaining defendant's motion for a directed verdict. At the time this motion was filed plaintiff had introduced the note, and had also shown that it had been delivered as defendant's individual obligation. The note being in writing, a consideration was imported; and, in the absence of proof from defendant, the case should have gone to a jury upon the testimony then adduced. The only witness offered down to that time testified that defendant delivered the note as his independent obligation. There was no error in overruling the motion to direct a verdict for defendant.

2. The fifth and sixth instructions above quoted are challenged. Of the fifth it is said that there is no basis for it, either in the pleading or the evidence. Plaintiff was not required, in the first instance, to plead any consideration for the note. That was presumed. In response to defendant's plea of no consideration plaintiff was not bound to state the consideration. There was, as we have seen, evidence as to a consideration for the note. There is no justification for the claim that defendants's view of the case was not presented to the jury by this fifth instruction. The sixth instruction is challenged because it omits to state that, if the parties understood the note was not to become binding upon defendant until others signed, it would not be a valid obligation. There is no merit

Digitized by Google

in this position. If there was an understanding it must have been based upon an agreement of the parties, and if there was an understanding by either not based upon an agreement, it would not be binding upon the other.

3. Next it is argued that the verdict is without support in the testimony. From the testimony already quoted it was manifestly a question for the jury to determine whether or not the note should become a binding obligation until others had signed with the defendant. On that issue there was a finding for the plaintiff, and it is not our province to interfere. The most troublesome question in the case is the issue of want of consideration for the note. That an extension of time to the principal debtor is a sufficient consideration is well established. The receipt of a note as security for a debt or forbearance to sue upon a present claim or debt, or the giving of an extension of time to an imputed debtor, will be sufficient to enforce the maker's obligation. Daniel Neg. Ins., § 183; Wormer v. Waterloo Works, 50 Iowa 262. And so if goods be furnished by A to B at the request of C, it is a good consideration for a note of C to A. Atherton v. Marcy, 59 Iowa, 651, 13 N. W. 759. Moreover, a debt due from a third person is a good consideration for a note from a maker to the creditor, provided there was either an express or implied agreement for an extension of time. Mansfield v. Corbin, 2 Cush. (Mass.) 151. An agreement will be implied if the debt is then due, and the note is made payable at a future day. Thompson v. Gray, 63 Me. 228; Fulton v. Loughlin, 118 Ind. 288, 20 N. E. 796; Yeatman v. Mattison, 59 Ala. 382. Now the evidence shows without any dispute that, when the lumber was delivered pursuant to a sale, which was presumptively for cash, the driving park association had nothing wherewith to pay the account, and that to settle and adjust the same the note in suit was made, either as the obligation of defendant alone, or to be signed by others, that this note was due on or before one year from date, thus giving defendant one year at his option to pay the same, and that thereafter the driving park association was not regarded as a debtor, or, if a debtor, the time for the payment of its account was extended. Under well-known rules this constituted a sufficient consideration for the note. Defendant's counsel has much to say in this connection regarding the statute of frauds, which, as we have already indicated, is not regarded as germane. The promise here is in writing, is admitted by defendant, and is not within the statute of frauds The only questions involved were those submitted by the trial court in its instructions.

Appellant's counsel argue, however, that there is no testimony to sustain the claim that the time for the payment of the lumber bill was extended, and they cite, and rely with great confidence upon, J. H. Queal & Co. v. Peterson, (Iowa) 116 N. W. 593. But that case is not controlling. It does not hold that an agreement to forbear may not be implied from circumstances. It is authority simply for the proposition that from forbearance alone without more an agreement to forbear will not be implied. But that there may be an implied agreement from such circumstances as are shown in this case is abundantly established by the authorities. See those heretofore cited, and Boyd v. Freize, 5 Gray (Mass.) 553. It is important,

Digitized by Google

in this connection, to remember defendant's relations to the driving park association, and that he in fact placed the order for the lumber, and at various times secured an extension of the time for the payment of the bill. There was enough testimony to support the verdict, and we discover no error.

The judgment must therefore be, and it is, affirmed.

Decision No. 1132.

MERCANTILE BANK OF MEMPHIS v. BUSBY et al.

(Supreme Court of Tennessee. Sept. 30, 1908.)

113 S. W. 390.

BILLS AND NOTES — PARTIES — JONT MAKERS — INDORSERS — NOTICE OF DISHONOR — PERSONS ENTITLED TO.

1. A stockholder of a corporation who, with other stockholders, indorsed a note before delivery, given to raise money for it and for their own benefit, and who understood that the note bound all the indorsing stockholders equally, was liable as a joint maker, and not entitled to notice of dishonor.

2. Negotiable Instruments Act, § 63 (Laws 1899, p. 152, c. 94), providing that a person placing his signature on an instrument otherwise than as a maker, drawer, or acceptor is deemed an indorser, and section 64 providing that where a person, not otherwise a party, places his signature in blank on an instrument before delivery, he is liable as indorser, merely create a prima facie liability as indorser, and the real contract can be shown, as between the immediate parties, it is not necessary that the indorsement should be accompanied by appropriate words in writing to show an intent to be bound in some other capacity.

3. Under Negotiable Instrument Act, § 115 (Laws 1899, p. 159, c. 94), providing that notice of dishonor is not required to be given an indorser where the instrument was made for his accommodation, a stockholder of a corporation who indorsed a note before delivery, given to raise money for it, and in reality for the benefit of himself and the other indorsers, was not entitled to notice of dishonor.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by the Mercantile Bank of Memphis against B. I. Busby, C. B. Blackburn, and others. Decree for complainant, and defendant Blackburn appeals. Affirmed.

Turley & Turley, for complainant. Caruthers Ewing, C. J. McSpadden, Cary & Rogers, and Lehman, Gates & Lehman, for defendants.

McALISTER, J. The original bill herein was filed on the 23d of May, 1906, against B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford, on the following note:

"$9,000. Memphis, Tenn., Sep. 2, 1905.

"Six months after date I promise to pay to the order of myself Nine Thousand Dollars at Mercantile Bank, value received. B. I. Busby."

Digitized by Google

The note had the following names indorsed on the back thereof in the following order, viz.:

"B. I. Busby.
"B. I. Busby Co., by B. I. Busby, Pres.
"C. B. Blackburn, Laconia, Ark.
"H. L. Williford.
"Pay American Exchange National Bank, New York, N. Y., or order.
"Mercantile Bank of Memphis, Tenn., W. A. Smith, Cashier, C. H. Raine, Pres."

There was a credit of $1,000 on this note dated April 5, 1905, and this suit was brought to recover the balance due, with interest.

The bill showed that the note was presented for payment at the Mercantile Bank, where it was payable on March 2, 1906, and payment refused, whereupon notice of non-payment was given to the various parties. The notice to C. B. Blackburn was deposited in the post office at Memphis, Tenn., on March 2, 1906, addressed to E. B. Blackburn, Laconia, Ark. On June 26, 1906, the defendant C. B. Blackburn filed an answer denying his liability as indorser on said note for the reason that notice was not given him of the protest of said note for non-payment, and also setting up other defenses in his answer, which it is unnecessary to mention. It was averred in his answer that the protest was invalid, and that due notice had not been given him. Defendant Blackburn insited that he had not resided at Laconia, Ark., for five or six years, but that he had been a resident of Doran, Phillips county, Ark. The answer averred that the notice of protest was addressed to him at Laconia, Ark., and that the first notice he had thereof was "some weeks thereafter when the same was found by respondent at the house where respondent's wife lives in the city of Memphis, and where respondent stays when in said city." The answer further avers that said notice was mailed "to respondent from Laconia on March 2, 1906, by a relative living at Laconia." The answer denied that complainant was the legal holder of the note or was entitled to maintain an action thereon. On the 12th of July, 1906, by permission of the court an amended bill was filed, wherein it was alleged that:

"The B. I. Busby Co. was a Tennessee corporation, in which B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford were all largely interested. That such parties desired to raise money for it and for their own benefit. With this in view the note in question was made in the form in which it appears. All of the indorsements thereof were made before the note was attempted to be used, and, after being so completely executed, the same was discounted by complainants. The money so borrowed went into the business of B. I. Busby Co., in which the various parties were interested."

The theory of the amended bill is that each and all of the parties to said note are equally bound thereof, and that no protest was necessary and no notice of non-payment had to be given. On August 27, 1906, C. B. Blackburn filed an answer to the amended bill wherein he admitted that he had been a stockholder in the B. I. Busby Company, but claimed that he was not otherwise interested therein, and insisted he was an accommodation indorser on said note. The an-

Digitized by Google

swer denied that C. B. Blackburn had ever waived protest and notice, or admitted liability on the note after it feel due.

The Willifords also filed their answers to the bill in which they claimed to be accommodation indorsers on said note. Proof was taken, and on the hearing the chancellor decreed:

"That the $9,000 note is unpaid, except that $1,000 was paid thereon on April 5, 1906, and that another payment of $2,301.16 was made thereon September 5, 1907, which payments are admitted by complainant. This last payment was a collection made of the Columbia Star Milling Co. v. B. I. Busby, before mentioned. Thereupon it is held and decreed as follows:

"(1) That the $9,000 note before mentioned was given for a debt or obligation and for the benefit of the B. I. Busby Co., a corporation in which the said B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford were stockholders.

"(2) That B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford were all in law joint makers of said $9,000 note and all liable therefor, and no protest of same was necessary.

"(3) That the Negotiable Instruments Law of Tennessee did not change or affect the liability of the parties to the $9,000 note, but all the parties are liable thereunder as above stated."

It was therefore held and decreed that the Mercantile Bank of Memphis have and recover of B. I. Busby, B. I. Busby & Co., C. B. Blackburn, and H. L. Williford the sum of $6,359.75, said amount being the principal and interest now due on the $9,000 note as aforesaid. The judgment was against all of said parties jointly and against each of them severally. It should have been stated that no decree was pronounced against C. D. Williford for the reason he had been adjudged a bankrupt in the District Court of the United States for the Southern District of New York, and discharged from all debts due by him on April 26, 1907, and that thereby he was discharged from all liability on the $9,000 note in suit.

The defendant Blackburn appealed from the decree of the chancellor, and has assigned numerous errors, most of which are based on the action of the chancellor in sustaining the exception of the complainant to certain questions and answers in the deposition of C. B. Blackburn. The main assignment of error, however, is that the chancellor erred in rendering a decree for complainants against the defendant Blackburn and in refusing to dismiss the bill as to him.

The main inquiry presented on the record is whether or not the defendant Blackburn was a joint maker of the note in question, or whether he was an accommodation indorser in the sense of the law merchant. A history of the note in suit will throw much light on this question. The record discloses that the predecessor of the B. I. Busby corporation was the B. I. Busby Company. This company was a firm composed of C. D. Williford and B. I. Busby. As already stated, it was succeeded by the B. I. Busby Company, corporation, chartered in February, 1904. The stockholders and their holdings were as follows:

C. B. Blackburn	$5,000 00
B. I. Busby	2,500 00
C. D. Williford	2,500 00
H. L. Williford	9,100 00

Digitized by Google

It appears that the B. I. Busby Company as a firm owed a $12,000 note to the Mercantile Bank which was indorsed by the Agar Packing Company. The corporation B. I. Busby Company took the stock of goods that Busby and Williford had, drays, mules, accounts, etc., and assumed this indebtedness of the firm. It appears that, when the corporation took over the assets and assumed the debts of the firm, the indebtedness was explained to the stockholders of the corporation. It appears that the note in question was gradually reduced by payments made by the corporation and renewals to $9,000. It appears that at a directors' meeting of the B. I. Busby corporation, November 12, 1904, B. I. Busby, C. B. Blackburn, H. L. Williford, C. D. Williford, and J. S. Hampton were present. The president explained the note of $12,000 indorsed by the Agar Packing Company, stating that it was simply the renewal of one he had formerly carried with the same indorsement, and that it was for borrowed money from the Mercantile Bank. He stated that it could not be expected that the Agar Packing Company, would again indorse this paper. It thus appears that C. B. Blackburn, the defendant, was present at the directors' meeting when the nature of this obligation was explained. It appears that another directors' meeting was held January 14, 1905, at which meeting C. B. Blackburn was present. The president stated that he did not want to again ask the Agar Packing Company to indorse this paper. Blackburn in his testimony does not deny that he was present and knew of this announcement. We think from Mr. Blackburn's cross-examination it is evident that he understood that all the notes which had been given in renewal from time to time of the original Agar Packing Company notes, and which were indorsed by the various stockholders of the B. I. Busby Company, corporation, bound all the indorsing stockholders equally. This is our conclusion of the nature of this transaction from an examination of the record. Under the authorities in this State prior to the passage of the Negotiable Instruments Law in 1899, the parties being liable on said note as joint makers were, of course, not entitled to notice of protest and non-payment. Bank of Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; Assurance Society v. Edmonds, 95 Tenn. 53, 31 S. W. 168; Logan v. Ogden, 101 Tenn. 392, 47 S. W. 489; Bank v. Lumber Co., 100 Tenn. 479, 47 S. W. 85. In this view of the case, it is an immaterial consideration that the notice of protest was sent to C. B. Blackburn at Laconia, Ark. It is insisted, however, on behalf of the defendant, that this rule has been changed by our Negotiable Instruments Act of 1899 (Laws 1899, p. 152, c. 94), and now a party to an instrument who is not a maker, drawer, or an acceptor is an indorser, and therefore entitled to notice of dishonor. The contention is that when a person's name appears on the back of a note, whether as a regular indorser or as an irregular indorser, he is to be held strictly as an indorser and in no other capacity, unless he clearly indicate by appropriate words written on the note his intention to be bound in some other capacity. The particular sections of the Negotiable Instruments Act relied on are as follows:

"Section 63. A person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his inten tion to be bound in some other capacity.

Digitized by Google

"Section 64. Where a person not otherwise a party to an instrument places thereon his signature in blank, before delivery, he is liable as indorser in accordance with the following rules:

"(1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties.

"(2) If the instrument is payable to the order of the maker or drawer or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"(3) If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

It is argued that, under the express language of section 63 of the Negotiable Instruments Act, C. B. Blackburn must be deemed to be an indorser of the note in question because there were no written words attached to the indorsement indicating his intention to be bound in some other capacity. It is said this result inevitably follows "unless he clearly indicates by appropriate words," etc.

It is insisted that this construction is reinforced by the language of the succeeding section 64.

Counsel cites Thorp v. White, 188 Mass. 333, 74 N. E. 592, also the case of Downey v. O'Keefe (decided in 1905), 26 R. I. 571, 59 Atl. 929.

On the other hand, it is insisted on behalf of the complainant that the Negotiable Instruments Act merely defined what kind of instrument creates a prima facie liability as indorser, and that the real contract can be shown now just as it could have been shown before the act was passed.

In Bunker on the Negotiable Instruments Law, the author, after referring to section 66 of the Negotiable Instruments Law of Michigan (Public Act 1905, p. 399, No. 265), which is the same as section 64 of the Tennessee act on the same subject, says:

"This section was construed by the Supreme Court of New York in Kohn v. Consolidated Butter & Eggs Co., 30 Misc. Rep. 725, 63 N. Y. Supp. 265. But the case was outside of the statute, in that it was alleged that the maker made and delivered the note to the payee and that thereafter the other defendants indorsed the note."

McAdam, Judge, said:

"The true intention of indorsers as between themselves can always be shown by oral evidence. To go further, and decide that the statute intended to create an incontestible liability against irregular indorsement would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interests of law reform."

The case of Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658, is cited for the proposition that in the State of New York liability created by the Negotiable Instruments Law is simply prima facie.

That was an action upon a promissory note brought against the executors of the first accommodation indorser by the second accommodation indorser who had been compelled to pay a judgment recovered against her upon the note by the payee named therein. The complainant alleged the making and delivery of a note to Kate A. Weichel, which before its delivery to her was first indorsed by the defendant's testator, and then by the plaintiff for the accommodation of the maker. It then alleged presentment, non-payment, and notice

Digitized by Google

thereof to each of the indorsers; next that thereafter the payee sued the plaintiff as indorser of the note, notice of which action was given to the defendants, and a judgment therein was recovered against the plaintiff for the amount of the note, interest, and costs, which was paid by her. The sum so paid she seeks to recover from the defendants on the indorsement by their testator. Said the court:

"It was formerly the rule in this State that, in the absence of any further agreement, such an indorser would not be liable to the payee of the note. To establish its liability, it had to be shown that he had indorsed the note for the purpose of giving the maker credit with the payee. Phelps v. Vischer, 50 N. Y. 69, 10 Am. Rep. 433. The same would formerly have applied to the plaintiff, whose liability would spring entirely from a special agreement on her part (beyond that which the law implied upon the mere fact of the indorsement) that such indorsement was for the purpose of giving the maker credit with the payee. . .

Section 114 of the Negotiable Instruments Law of 1897 (Laws 1897, p. 734, c. 612) provides that, where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser to the payee, and to all subsequent parties, if the instrument is payable to a third person. Before that provision was enacted, a third party could not be charged as an indorser of a promissory note before delivery, unless the complainant alleged that the indorsement was made in order to give the maker credit with the payee, or that the party indorsed the note as surety for the maker. The omission of such an allegation was held to be a fatal defect in an action to charge such an indorser. The necessity of an averment to that effect appears no longer to exist. However, in view of the plain language of section 114 of the Negotiable Instruments Law, it seems to require nothing more than the simple fact of the indorsement to render the defendant prima facie liable in such a case. McMoran v. Lange, 25 App. Div. 11, 49 N. Y. Supp. 310.

The cases of Thorpe v. White and Downey v. O'Keefe are cited by counsel for appellant as announcing a contrary rule. In Thorpe v. White (June 19, 1905), 188 Mass. 333, 74 N. E. 592, it appeared:

"The defendant Hannah C. Hand irregularly became a party to the promissory note set forth in the bill of complainant, as before delivery she signed her name in blank on the back of an instrument of which the defendant White was the maker and the plaintiff the payee."

Du Bois v. Mason, 127 Mass. 37, 38 s. c. 34 Am. Rep. 335.

The court said:

"According to the law relating to negotiable promissory notes before Statutes 1898 (Laws 1898, p. 502, c. 533) took effect she was liable as a promissor between herself and the plaintiff, although entitled to notice as if she were an indorser when the note was not paid at maturity by the maker [citing cases]. But, after the Negotiable Instruments Act became operative, the distinction was abolished, and the effect of her signature was to make her an indorser as to all parties."

In Downey v. O'Keefe (January 18, 1905), 26 R. I. 571, 59 Atl. 929, the court said:

Digitized by Google

"Action on a note by Michael R. Downey against Joseph O'Keefe and another. The note was as follows:

" '$275.00 Providence, March 18, 1899.

" 'Six months after date we promise to pay to the order of Michael R. Downey Two Hundred and Seventy-five Dollars at his office, No. 712 Banigan Building, with interest at 5% per month, value received.

" 'Joseph O'Keefe,

" 'Dennis J. O'Conner.'

"Upon the back was the signature of John McCann. It was shown in evidence that the note was signed by the makers and delivered to one Hart, the agent of the plaintiff, who took it to McCann, and procured his indorsement. The executor of McCann resisted the suit, and prays for a new trial on the ground that his testator was a mere accommodation indorser, and did not sign until after the delivery of the instrument. . . . It has been uniformly held in Rhode Island until the passage of the Negotiable Instruments Act (Pub. Laws 1898–99, p. 222, c. 674), which does not apply to instruments before July 1, 1899, that one who indorses a note payable to another before its issue is liable to the payee as a joint maker [citing authorities]. It makes no difference whether the signature is actually indorsed upon the note before or after it comes into the possession of the payee, if it is part of the agreement that the note shall be so indorsed to be acceptable [citing authorities].

We do not think these cases necessarily decide that under the Negotiable Instruments Law an instrument under circumstances like these renders the party absolutely liable as indorser, since no special agreement was shown.

We are of opinion that the real contract between the parties can be shown now as fully as it could have been shown before the passage of the Negotiable Instruments Act, and that, as between the immediate parties, it is not necessary that the indorsement should be accompanied by appropriate words in writing, showing an intention to be bound in some other capacity.

As to innocent holders for value, the rule, of course, would be otherwise, and the statute would apply.

So far from an intention manifested by the legislature to destroy this well-established rule we think section 63 of the said act, providing that the person is to be deemed an indorser unless by appropriate words he is bound in some other capacity, is but a legislative recognition of the rule prevailing at the date of the passage of the act.

There is another reason why notice of dishonor of the note in suit was not necessary to be given the defendant C. B. Blackburn. Section 115 of the Negotiable Instruments Act provides that:

"Notice of dishonor is not required to be given to an indorser in either of the following cases:

"1st. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;

"2nd. Where the indorser is the person to whom the innstrument is presented for payment;

"3d. Where the instrument was made or accepted for his accommodation."

Digitized by Google

In our opinion the facts disclosed in this record show that this note was in reality executed for the benefit of every person whose name appears on it. As already stated, it is established in proof that this was an obligation of the B. I. Busby corporation, and that these parties were all stockholders and directors, and that the note was executed for the purpose of renewing an outstanding indebtedness of the corporation. It is in proof that the B. I. Busby corporation received all the assets and assumed all the liabilities of the firm of B. I. Busby & Co. Our conclusion on this branch of the case is that C. B. Blackburn was not entitled to notice of dishonor, since he was a joint maker and equally interested in the note with his co-makers and indorsers. We have also considered the questions made on the alleged alteration of the note, its cancellation, etc., but do not find these assignments of error well taken. It results that the decree of the chancellor must be in all respects affirmed.

Decision No. 1133.

J. W. PERRY CO. v. TAYLOR BROS. et al.

(Supreme Court of North Carolina. Sept. 30, 1908.)

62 S. E. 423.

BILLS AND NOTES — "INDORSERS" NOTICE OF NON-PAYMENT AND DISHONOR.

By the express provisions of Revisal 1905, §§ 2212, 2213, 2219, 2239, one indorsing a note in blank before delivery, without indicating his intention to be bound otherwise, is an "indorser," who, not being given notice of non-payment and dishonor, is discharged.

Appeal from Superior Court, Greene County; W. R. Allen, Judge.

Action by the J. W. Perry Company against Taylor Bros, and others. From an adverse judgment, plaintiff appeals. Affirmed.

L. V. Morrill and C. B. Aycock, for appellant. Jarvis & Blow, for appellees.

WALKER, J. This action was brought to recover the amount of a promissory note made on May 23, 1906, by B. D. Taylor and others to the plaintiff, for the sum of $2,500, with interest from its date. The defendants J. T. Bowles and A. F. Moye (appellees) indorsed the note in blank before it was delivered to the plaintiff. The note was not paid at maturity, but was dishonored. The plaintiff failed to give notice to the indorsers of non-payment and dishonor, and they were not notified of the same until this action was commenced. The court intimated upon the evidence that, as plaintiff had failed to give notice of non-payment and dishonor, the jury would be instructed to answer the issues in favor of the defendants, who were the indorsers. The plaintiff excepted, submitted to a nonsuit in deference to the intimation of the court, and appealed.

Whatever may have been the law heretofore, it is now provided,

Digitized by Google

and was so provided at the time the note upon which this suit was brought was given, as follows: "A negotiable promissory note, within the meaning of this chapter, is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable time, a sum certain in money to order or to bearer." Revisal 1905, § 2334. "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Revisal 1905, § 2212. "Where a person, not otherwise a party to the instrument, places thereon his signature, in blank, before delivery, he is liable as indorser [under rules specified in the section]." Revisal 1905, § 2213. "Presentment for payment is not necessarily in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." Revisal 1905, § 2219. "Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged." Revisal 1905, § 2239.

It appears, therefore, that as the defendants placed their signatures on the back of the note, and they were not otherwise parties to the instrument, they became liable as indorsers, and were entitled to notice of dishonor after its maturity. Eaton & Gilbert on Commercial Paper, § 108. The case of Rouse v. Wooten, 140 N. C. 558. 53 S. E. 430, 111 Am. St. Rep. 875, which was cited by the plaintiff's counsel, does not bear on this case, as there the defendant was a surety, and so found to be by the jury. The only question raised in that case was whether a surety is entitled to notice of non-payment and dishonor. We held that he is not. The ruling of the judge was correct.

No error.

Decision No 1134.

AMERICAN NAT. BANK v. FOUNTAIN.

(Supreme Court of North Carolina. Oct. 28, 1908.)

62 S. E. 738.

BILLS AND NOTES — ACTIONS — BURDEN OF PROOF — GOOD FAITH AND PAYMENT FOR VALUE — "HOLDER IN DUE COURSE" — TRIAL — INSTRUCTIONS — ASSUMPTIONS AS TO FACTS — QUESTION FOR JURY — PLEADING — PLEAS — NOT GUILTY — SCOPE OF ISSUES — CREDIBILITY OF EVIDENCE — COURTS — ADJUDICATION — PREVIOUS DECISIONS AS PRECEDENTS — DECISIONS ON FACTS.

1. Under Revisal 1905, § 2201, defining a "holder in due course" as one who takes a negotiable instrument, complete and regular on its face, before it is overdue and without notice of dishonor, in good faith and for value, and who at the time of

Digitized by Google

transfer had no notice of any infirmity in it or defect in the title of the person negotiating it, and section 2208 thereof, providing that every holder is deemed prima facie a holder in due course, but, when it is shown that the title of any one negotiating the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as a holder in due course, etc., where fraud in procuring the note has been established, or there is a defect in the title of one negotiating it, the burden is on one suing thereon to show that he or one under whom he claims was a holder in due course, as defined by section 2201.

2. In an action on a note by an indorsee, the defense being that it was procured by misrepresentation by the payee, plaintiff's indorser, an instruction that, the evidence of fraud having placed the burden on plaintiff to show that he was a holder in due course, and he having responded by showing that he acquired the note in good faith, for value, etc., his prima facie case was restored, was error, as assuming that plaintiff's evidence was true and withdrawing this question from the jury, though, if no reasonable inference to the contrary was admissible under the evidence, an instruction to find for plaintiff, if the jury believed the evidence, would have been proper.

3. In an action by an indorsee of a promissory note, the defense being that it was procured by fraud, and evidence being offered to establish fraud, the good faith of plaintiff's purchase and the credibility of the evidence upon the issue were for the jury.

4. The plea of not guilty puts in issue the credibility of the testimony, even if it is uncontradicted.

5. A judicial decision is to be considered as authority only in connection with the facts on which it was decided.

Appeal from Superior Court, Nash County; Neal, Judge.

Action by the American National Bank against S. K. Fountain. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

The action was to recover the balance due on a promissory note for the purchase price of an automobile, given by defendant to one B. A. Blenner, and by said Blenner indorsed to plaintiff. The defendant resisted recovery on the ground that the note was procured by false and fraudulent representations on the part of Blenner, the vendor. The jury found that the note sued on was procured by misrepresentations and fraud on the part of Blenner, the vendor, and that the plaintiff was indorsee for value before maturity, and without knowledge or notice of any infirmity affecting the validity of the note. There was motion for a new trial on exceptions properly noted, which was overruled. Defendant excepted. Judgment on verdict for plaintiff, and defendant excepted and appealed.

T. T. Thorne and Jacob Battle, for appellant. Bunn & Spruill, for appellee.

HOKE, J. Our statute on negotiable instruments (Revisal 1905, c. 54, § 2201) defines a "holder in due course" as one who takes a negotiable instrument that is (a) complete and regular in its face; (b) before it was overdue and without notice that it had been previously dishonored (if it had been); (c) in good faith and for value; (d) and at the time it was negotiated to him he had no notice of any infirmity in the instrument or any defect in the title of the person

Digitized by Google

who negotiated it. And section 2208 of same chapter provides as follows: "That every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as holder in due course," etc. These sections of the statute are, to a great extent, a codification of certain general principles of mercantile law, applicable to the subject, established by well-considered decisions of the court in this country and England, notably Tatam v. Haslar and Others, 23 Q. B. Div. (1889) 345; National Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; Giberson v. Jolly, 120 Ind. 301, 22 N. E. 306; etc.

There is some conflict of authority as to the extent and proper application of the burden which the law casts upon a plaintiff, where fraud has been established, or when there has been evidence offered tending to establish it, which is thus referred to in Norton on Bills and Notes 334: "In the cases of illegality the rule is the same, and for the same reason. The burden is cast upon the plaintiff to show that he took the paper for value and in good faith. Some of the cases declare that the holder need not show that he had lack of notice, but need only show value, because the burden of showing notice is upon the party who seeks to impeach the title. But the other courts maintain, and properly, that in addition to proving value the holder should prove that he bought the note in good faith, and should show that he had no knowledge or notice of the fraud. If value and notice are disputed as facts, they must be passed upon by the jury." The author, in note 92, cites several additional cases in support of the text. In Tatam v. Haslar, supra, it was held "that when fraud is proved the burden of proof is on the holder to prove both that value has been given, and that it has been given in good faith, without notice of the fraud." In Vosburgh v. Diefendorf, supra, it is held: "(1) Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must, before he is entitled to recover thereon, show that he is a bona fide purchaser or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value. He must show that he had no knowledge or notice of the fraud."

The statute, then, having enacted into a law the doctrine sustained by these authorities, the rule established by the statute must be observed, to the effect that when fraud has been established in procuring the note, or in the title of any one who has negotiated the instrument, the burden is on the plaintiff to show that he, or some one under whom he claims, acquired the title as a holder in due course; that is, that he acquired the title (1) before maturity, (2) in good faith and for value, (3) without notice of any infirmity or defect in the title of the person negotiating it. And where the facts established call for its application, the rights of the parties must be determined under the rule as to the burden of proof which the statute provides. We are inclined to the opinion that the defendant was not given the full benefit of this principle in the charge of the court below; but, if it should be conceded that, when taken in connection with the testimony offered, there was no reversible error in the respect sug-

Digitized by Google

gested, certain it is that the charge erroneously invades the province of the jury in assuming, as it does, the truth of the evidence offered by the plaintiff on the essential facts of the transaction. Thus, after properly placing the burden on the plaintiff, by reason of evidence offered tending to establish fraud, the charge proceeds: "But the plaintiff having responded by showing that it acquired the note bona fide, for value, in the usual course of business, and while it was still current, and before its maturity, the prima facie case of the plaintiff is restored." And again: "The court further charges you that the prima facie case of the plaintiff having been restored by the uncontradicted evidence of the president of the bank that it acquired the note in the usual course of business, before maturity, and without notice of any vice in it," etc.

It may be that when fraud is established in procuring the instrument, or there was evidence offered tending to establish it, if the plaintiff, as he is then required to do, should lay before the jury all the evidence available as to the transaction, and it should thereby apear, with no evidence to the contrary, and no other fair or reasonable inference permissible, that plaintiff was the purchaser of the instrument in good faith, for value, before maturity, and without notice, the court could properly charge the jury, if they "believed the evidence," or if they "found the facts to be as testified," a more approved form of expression, they would render a verdict for plaintiff. But here, the fraud having been established, or having been alleged, and evidence offered to sustain it, the circumstances and bona fides of plaintiff's purchase was the material question in the controversy; and both the issue and the credibility of the evidence offered, tending to establish the position of either party in reference to it, was for the jury and not for the court. State v. Hill, 141 N. C. 771, 53 S. E. 311; Riley's Case, 113 N. C. 651, 18 S. E. 168. As said by the court in this last case, the "plea of not guilty disputes the credibility of the evidence, even when uncontradicted."

His honor below, therefore, had no right to say to the jury, on this very material question: "The prima facie case of plaintiff having been restored by the uncontradicted evidence of the president of the bank that it acquired the note in the usual course of business, before maturity and without notice of any vice in it." For this assumes that the statement of the president is to be taken as true, and withdraws that matter from the jury. The precise question was presented in the case of Bank v. Iron Works et al,, 159 Mass. 158, 34 N. E. 93, and in that case it was held: "(1) In an action on a promissory note, which was defended on the ground that the note had been fraudulently put into circulation by the P. L. Co., a Massachusetts corporation, organized for the purpose of 'doing a brokerage business in commercial papers, stocks, bonds, and other property,' from whom the plaintiff company acquired it, the plaintiff's officers testified that the note was taken by them in good faith and for value before maturity, and the defendant introduced no testimony to contradict these officers. Held, that the defendant was entitled, nevertheless, to go to the jury on the question whether the plaintiff took the note for value and without notice of the fraud."

The trial court was probably misled by the language of the opinion in Bank v. Burgwyn, 110 N. C. 273, 14 S. E. 623, 17 L. R. A. 326,

Digitized by Google

making a quotation from Daniel on Negotiable Instruments, § 819, without adverting to the facts stated in the case on appeal, and it is in reference to such facts that a decision is to be considered authority, from which it appears that the trial court in that case had submitted the question of the bona fides of plaintiff's purchase to the jury, and had not undertaken to determine it, as was done in the present case. The statement of the law contained in this section of Mr. Daniel's valuable work on Negotiable Instruments (section 819) has been subjected to adverse comment in the decisions on the subject which we have adopted as law by our statute, and there is doubt if, since the enactment of this statute, it can be regarded as correctly expressing the rule for trial of causes affected by this section of the statute in reference to the burden of proof.

As heretofore stated, when fraud is proved, or there is evidence tending to establish it, the burden is on the plaintiff to show he is a bona fide purchaser for value, before maturity, and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for plaintiff; the burden in such case having been clearly rebutted. But the issue itself, and the credibility of material evidence relevant to the inquiry, is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury.

There will be a new trial, and it is so ordered.

New trial.

Decision No. 1135.

COLE BANKING COMPANY v. SINCLAIR et al.

(Supreme Court of Utah. November 19, 1908.)

98 Pac. 411.

BILLS AND NOTES — ACTIONS — BURDEN OF PROOF — HOLDING IN DUE COURSE — RIGHT OF ACTION — GROUNDS — APPEAL AND ERROR — REVIEW — QUESTIONS CONSIDERED — QUESTIONS UNNECESSARY TO DECISION.

1. Comp. Laws 1907, § 1611, provides every holder of a negotiable instrument is prima facie a holder in due course; but, when the title of any one negotiating the instrument is shown to be defective, the burden is on the holder to prove title acquired in due course. Section 1607 makes the title of one negotiating the instrument defective when he obtained it by fraud, etc., or other unlawful means. By section 1609 a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available between the parties themselves, and may recover the full amount of the instrument from all parties liable thereon, and by section 1576 it is presumed that every negotiable instrument was issued for a valuable consideration. Held, that a partial failure of consideration as between the parties to a negotiable note was not a defect in title, so as to require an indorsee suing thereon to show himself a holder in due course; the burden of showing want of consideration and notice thereof by the indorsee being upon the maker.

Digitized by Google

2. There being no evidence that the indorsee had notice of a failure of consideration between the parties, he was entitled, under the statutes, to recover on the instrument as a holder in due course without notice.

3. Where, in an action by the indorsee of a note against the maker, the statutory presumption that plaintiff was a holder in due course, being unrebutted, was alone sufficient to warrant a finding that he was such holder, the competency of other evidence offered by him to show a holding in due course need not be determined on defendant's appeal.

Appeal from District Court, Third District; F. D. Lewis, Judge.

Action by the Cole Banking Company against C. G. Sinclair and another. From a judgment for plaintiff, one of defendants appealed. Affirmed.

J. E. Darmer and S. P. Armstrong, for appellant. E. A. Walton, for respondent.

STRAUP, J. This action was brought to recover money alleged to be due on a promissory note. It was alleged in the complaint that the defendant Hensel executed and delivered the note to the defendant Sinclair; that, before maturity, Sinclair indorsed and delivered the note to plaintiff, guaranteeing the payment thereof; and that payment was demanded of the defendants which they failed and refused to make. The defendant Hensel answered, admitting the execution and delivery of the note, and further alleged that he executed it in payment of premiums on a life insurance policy delivered to him by Sinclair as the agent of the insurance company issuing the policy, and upon the further consideration that Sinclair promised him "that the company would require his services [those of a physician] in the examination of applicants for insurance, and that it would furnish him with a sufficient amount of such business to reimburse him for the premiums which he might pay on the policy; that afterwards this defendant and said Sinclair learned that said company did not have the business as promised, and canceled said policy of insurance, and same was delivered back to said Sinclair as agent of said company, and that said note should have been delivered up and canceled;" that plaintiff paid no consideration for the note, but took it for collection only, and that it was not purchased nor held by it in good faith. In its reply the plaintiff denied that the note was only received by it for collection, and averred that it was purchased by it before maturity and in good faith, and for a valuable consideration. The case was tried to the court, who found the note negotiable, and that the plaintiff before maturity, in due course of business, purchased it from Sinclair, who indorsed and delivered it to plaintiff in good faith and for a valuable consideration, and without notice of any equities or defenses thereto. Judgment was thereupon entered in favor of plaintiff, from which the defendant Hensel has prosecuted this appeal.

He insists (1) that there is not sufficient evidence to support the finding that the plaintiff purchased the note before maturity in good faith for a valuable consideration and without notice of the defense pleaded by him, and that the burden of proving such facts was upon the plaintiff; and (2) that the evidence which was introduced by plaintiff in support of such facts was incompetent and erroneously admitted over the defendant's objections.

Digitized by Google

By section 1604, Comp. Laws 1907, "a holder in due course" is defined. Section 1611 provides that "every holder is deemed prima facie to be a holder in due course; but, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title in due course." By section 1607 it is provided that "the title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." By section 1609 that "a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." The defense pleaded was not illegal, but mere partial failure of consideration. Failure or want of consideration does not constitute a defective title within the meaning of the foregoing provisions. 1 Daniel, Neg. Inst., §§ 814, 817. In the treatise of Eaton & Gilbert on Commercial Paper and the Negotiable Instruments Law, at section 79, in discussing the statutory provision corresponding to section 1611 of our statute, it is said by the authors: "In the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a bona fide holder for value, and this presumption is not repelled merely by proof that the bill or note, as between the immediate parties, was without consideration, and was made, indorsed, or accepted by one for the sole accommodation of the other. When no other proof is given, the holder is not bound to prove a valuable consideration. . . . It will be noticed that the statute provides that proof of a defective title shifts the burden of proof upon the holder. A title is defective where the instrument is obtained for an illegal consideration. It follows, therefore, that if the consideration be shown to be illegal, as for a gambling debt, an unlawful sale of commodities, or as being tainted with usury, the burden of proof will then rest upon the plaintiff to show that he was a holder in due course; but proof of a want or failure of consideration does not in most jurisdictions operate to shift the burden of proof to the plaintiff." Cases are cited by the authors to the effect that the indorsee, in an action by him against the maker, cannot be called on to prove consideration until the defendant has shown that the note was obtained or put in circulation by fraud or undue means, and that proof of want or failure of consideration between a maker and a payee of a promissory note does not change the presumption that one to whom the latter has indorsed and delivered the note is a bona fide holder for value, but the burden of proof is upon the maker.

No facts are pleaded showing that "the instrument, or any signature thereto," was obtained "by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration," or that the note was negotiated "in breach of faith, or under such circumstances as amount to a fraud." From plaintiff's possession as indorsee and production of the note the statute deemed it prima facie to be a holder in due course. By other provisions of the statute (section 1576), it

Digitized by Google

is also presumed that every negotiable instrument was issued for a valuable consideration, and that every person whose signature appears thereon became a party thereto for value. The question of defective title was not an issue raised in the case, nor was any evidence introduced in support of such an issue. The evidence introduced by way of defense was merely in respect of failure of consideration. As to such matters the burden was upon the defendant to establish it, and to show notice to the plaintiff. While the defendant gave evidence tending to establish the facts alleged in his answer with respect to the alleged promise made to him by Sinclair, he gave no evidence that the plaintiff, prior to the purchase of the note, had notice thereof.

Having reached this conclusion, it is wholly unnecessary to consider the assignment with respect to the question of the competency of other evidence which was introduced by the plaintiff for the purpose of showing that it was a holder in due course, and that it purchased the note in good faith for value, and without notice of the defendant's alleged defense. The provisions of the statute that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value, and every holder deemed prima facie to be a holder in due course (except when shown that the title of any person who negotiated the instrument was defective, which was not alleged nor shown), were alone sufficient to authorize the findings made by the court on these matters.

The judgment of the court below is therefore affirmed, with costs.

McCARTY, C. J., and FRICK, J., concur.

Decision No. 1136.

CITY NAT. BANK OF COLUMBUS, OHIO, v. JORDAN et al.

(Supreme Court of Iowa. September 29, 1908.)

117 N. W. 758.

EVIDENCE — COMPETENCY — MOTIVE AND INTENT — SALES — ACTION FOR PRICE — DEFENSES — FRAUDULENT REPRESENTATIONS — ADMISSIBILITY — BILLS AND NOTES — FRAUD — DEFENSE — OPINION EVIDENCE — MARKET VALUE — COMPETENCY OF WITNESSES — CONCLUSION OF WITNESS — PAROL TESTIMONY — VARYING TERMS OF WRITING — ANSWER — MISREPRESENTATIONS — PLEADING — JOINT OR SEVERAL DEFENSES — PRINCIPAL AND SURETY — LIABILITY OF SURETY — AVAILABILITY — BONA FIDE HOLDER — BURDEN OF PROOF.

1. Where motive or intent of a party is material in determining rights, it is competent for him to testify thereto; and the fact that the testimony partakes of the nature of an opinion or a conclusion and relates to an ultimate fact on which the jury must pass in reaching their verdict does not exclude it.

2. Where, in an action on a note given for the price of a horse, defendants relied on false representations by the seller inducing the purchase of the horse, and alleged that the horse proved worthless, it was competent for them to show the alleged

Digitized by Google

representations, their falsity, and that, relying on them they were induced to buy the horse, and whether they relied on the reprsntations was a matter to which they alone could give direct testimony.

3. An answer in an action on a note given for the price of a horse, which alleges that the horse was sold to defendants for breeding purposes, under false representations as to his record and quality, and that he proved to be substantially worthless for such purpose, sets forth a good defense, except as against an innocent holder.

4. Market value is not the subject of mathematical or exact statement, and can be proved only as a matter of opinion by competent witnesses.

5. The ownership and possession of personalty afford some ground for the presumption of capacity to testify as to its value.

6. Farmers who had for years raised and handled horses, and who had bought a horse, and had it in their possession for a long time and observed its capacity, were competent to testify as to its value.

7. Where, in an action for the price of a horse, defendants relied on the false representations of the seller, and alleged that, after discovering their falsity, they sent a letter stating their election to rescind, and offering to return the horse to him, the identification by one of the defendants of a letter purporting to be received from the seller as a part of the correspondence, together with the identification of it by parol as in response to the letter sent to the seller, was proper as against the objection that the testimony was the conclusion of the witness.

8. Such identification did not violate the rule excluding parol testimony varying the terms of a writing.

9. Letters received by a party to a suit through the mails purporting to have been addressed to him by the adverse party with reference to matters relevant to the controversy, and in response to letters written by the party, are admissible in evidence without further proof of their authorship.

10. In an action for the price of a horse, an answer alleging false representations inducing the purchase of the horse, and averring that it was falsely represented that the horse had but recently been imported from France, and had never been used in this country for breeding purposes, and that the seller produced for the inspection of the buyers a certificate in the French language which he claimed showed a record of the horse, which certificate the buyers were unable to translate, alleging misrepresentations of a material character, and sufficient to justify a rescission on the discovery of the fraud.

11. While a defense personal to one defendant like coverture or minority or other lack of capacity to contract is not available to his co-defendant, a defense going to the merits of the case or to the substance of the contract sued on may be pleaded by all of defendants, or, where pleaded by one of them, it inures to the benefit of all.

12. As a general rule, the liability of a surety is not greater than that of his principal, and he may have the benefit of any defense which the principal pleads or can plead.

13. Fraud in inducing a principal to make a promise will release the surety as the same affects the character of the debt.

14. Several persons formed an informal association for the purchase of a horse. The seller did not offer to sell any interest in the horse, except on condition that enough buyers were found to take the entire ownership. When the required number was found, the entire title was transferred, and all the buyers united in a note for the price. The seller made false representations to some of the buyers which induced the purchase. Held, that the note was a joint contract, on which all the buyers were liable, either as principal makers or as sureties for their co-makers, and in either case the false representations were a good defense to an action on the note, in the hands of any person charged with notice

Digitized by Google

15. Where a note was tained with fraud in its inception, the presumption of good faith ordinarily attaching to the purchase of negotiable paper before maturity no longer obtains, and the burden is on the indorsee to show that he received the paper in due course and without notice of the fraud.

Appeal from District Court, Palo Alto County; D. F. Coyle, Judge.

Action at law upon a promissory note. There was a directed verdict and the judgment for plaintiff, and defendants appeal. Reversed.

J. A. Henderson and B. E. Kelly, for appellants. E. A. Morling, for appellee.

WEAVER, J. The petition is based upon a promissory note made August 24, 1903, for the sum of $1,000 and interest, payable July 1, 1905, to the order of McLaughlin Bros., by whom it is alleged to have been indorsed and transferred to the plaintiff before due and without notice of any defense thereto. The answer of the defendants is not very clearly stated, but we may deduce therefrom the following defenses: The first of these is based upon an alleged rescission of the contract of purchase because of false representations made by the payees or their selling agent concerning the horse, its breeding, and record. It is further alleged that the horse was purchased for breeding purposes; that the vendors represented and guaranteed him to be capable of getting with foal sixty per cent. of the producing mares served by him, but that he proved to be substantially unfit and worthless for such uses, thereby rendering the note void for failure of consideration. After the conclusion of the evidence, and pending plaintiff's motion to direct a verdict in its favor, the defendants tendered, but were denied permission to file, an amendment to their answer, alleging an oral warranty and representation by the selling agent that the horse was a foal getter in sixty per cent. of its services, and that said warranty and representations were falsely made by the vendors with knowledge of their falsity; that defendants believed and relied thereon in making the purchase; and that, on discovering the deception practiced upon them, they tendered a return of the horse to said vendors, and demanded a surrender of the note in suit. The motion to direct a verdict for plaintiff was based upon ten different propositions. Stated in condensed form, the points made by the motion were that the evidence introduced had no tendency to sustain any of the defenses pleaded; that the alleged false representations were of an immaterial character; that said representations do not appear to have been made to all of the makers of the note, and were therefore insufficient to constitute a defense in favor of any of them; that the good faith of the purchaser of the note had been conclusively shown; and that the alleged rescission of the purchase was not made in due time. The motion was sustained generally, and judgment entered against the defendants jointly for the full amount of the note. Very many exceptions have been preserved by the appellants to the rulings of the trial court, but we shall take the time to mention those only which we deem decisive of the appeal.

1. One of the defendants, having testified that the selling agent represented the horse to have been imported from France in the preceding May or June, and at the same time produced for the pur-

Digitized by Google

chasers' inspection a paper or certificate in the French language which he claimed to show a breeding record of eighty-two per cent. for said animal, was then asked by his counsel whether he entered into the contract of purchase by reason of the representations so made by the agent. To this inquiry the defendant objected, as "calling for the conclusion of the witness upon one of the ultimate facts in issue and incompetent and immaterial." The objection was sustained; the ruling being accompanied by the court's suggestion of a different method of presentation by which the desired matter might in its judgment be made admissible. The same witness having testified that the horse was worthless for breeding purposes, the answer was stricken out on motion of the plaintiff "as a conclusion of the witness, and without sufficient foundation, and because the inquiry as to value called not for facts, but for the witnesses' opinion." Similar rulings were made upon the offer of like testimony by other defendants. In each of the instances mentioned the objection should have been overruled. It is true in a certain sense that, in saying he entered into the purchase because of or in reliance upon the representations made to him by the seller, the defendant is testifying to a conclusion, and, perhaps, to one of the ultimate matters of fact involved in the controversy, but this is by no means conclusive of the inadmissibility of the evidence. Whenever motive or intent or the reasons operating to induce a given action by a party are material considerations in determining rights involved in any litigation, it is competent for such party to testify thereto; and the fact that such testimony may partake of the nature of an opinion or a conclusion, or may relate to some ultimate fact or facts upon which the jury must pass in reaching their verdict, work no exception to the rule. 3 Wigmore's Evidence, §§ 1920, 1921; 1 Elliott's Evidence, § 581. Under the issues in the present case, it was competent for the defendants to show that the selling agent made the alleged representations concerning the horse; that such representations were false; and that they, relying thereon, were induced to make the purchase. Whether they did so believe and rely was a matter to which they alone could give direct testimony, and they were entitled to have their sworn statement in that respect go to the jury for whatever it might be deemed worth, when considered with all other facts and circumstances bearing upon that question. Hulett v. Hulett, 37 Vt. 586; McKown v. Hunter, 30 N. Y. 625; Bass v. United States, 20 App. D. C. 232; Shockey v. Mills, 71 Ind. 288, 36 Am. Rep. 196; Watson v. Cheshire, 18 Iowa, 202, 87 Am. Dec. 382; Browne v. Hickie, 68 Iowa, 330, 27 N. W. 276; Zimmerman v. Brenon, 103 Iowa, 144, 72 N. W. 439; Safford v. Grout, 120 Mass. 20; Watkins v. Wallace, 19 Mich. 57; Yerkes v. Railroad Co., 112 Wis. 184, 88 N. W. 33, 88 Am. St. Rep. 961. Directly in point with the case before us are Parrish v. Thurston, 87 Ind. 440; Grever v. Taylor, 53 Ohio St. 621, 42 N. E. 829; Weaver v. Cone, 174 Pa. 104, 34 Atl. 551; Hard v. Ashley, 117 N. Y. 617, 23 N. E. 177. In all these cases evidence such as was excluded by the trial court in this case as to the reasons influencing the defendant's actions is held admissible.

Nor can we find any valid ground upon which to sustain the order striking out the witnesses' testimony as to the alleged worthless character of the horse. It is true that no counterclaim for damages for breach of warranty was pleaded, but there was a plea that the horse

Digitized by Google

was sold to the defendants as a breeder and for breeding purposes under false representations as to his breeding record and quality, and that he proved to be substantially worthless; thus causing an entire failure of consideration for which the note had been given. That this constitutes a good defense except, as against innocent holders of the paper, see Parsons v. Mallinger, 122 Iowa, 703, 98 N. W. 580.

To uphold the further objection made by counsel, that the witnesses' answer was a mere matter of conclusion, would be to establish a rule excluding all evidence of value. Market value is not the subject of mathematical or exact measurement or statement, and can be proved only as a matter of opinion or judgment by competent witnesses. The rule as to competency of witnesses on questions of value is not very narrow, and is always liberally construed. Clark v. Ellsworth, 104 Iowa, 449, 73 N. W. 1023; Jeffries v. Snyder, 110 Iowa, 359, 81 N. W. 678. The ownership and possession of personalty afford some ground for the presumption of capacity to speak as to its value. In the present instance, in addition to the fact that the witnesses were the purchasers of the horse, and had had it in their possession for a long time and tested and observed its capacity, it was further shown that they were farmers, and had for years raised and handled horses, and these facts we are satisfied were sufficient to make their testimony admissible. In addition to the cases already cited, see Shea v. Hudson, 165 Mass. 43, 42 N. E. 114; Tubbs v. Insurance Co., 131 Iowa, 217, 108 N. W. 324.

It having been shown that, after discovering the alleged falsity of the representations made by the selling agent, defendants sent a letter or written notice to the payees of the note, informing them of their election to rescind the purchase, and offering to return the horse to them at any place they might designate in the State of Iowa, one of the defendants upon the witness stand produced a letter dated August 8, 1904, purporting to be addressed to him by the said McLaughlin Bros. with reference to the complaints which had been made concerning the breeding qualities of the horse, and proposing its exchange for another. This letter the defendant sought to have identified by the witness and introduced in evidence as set forth in the following excerp from the record of the testimony of said witness (Exhibit 8 therein mentioned being the communication from defendants to McLaughlin Bros. and Exhibit 9 the alleged reply thereto): "Q. Examine defendant's Exhibit 9, and state whether or not that is the written acknowledgment you received in answer to that notice. A. Yes, sir. Q. Did you on the 28th of July— Mr. Morling: We object to that part of the testimony which says that is an answer to the notice as being a conclusion of the witness. (Objection sustained. Defendants except.) Witness: I did not on the 28th of July, 1904, address any other letter to the Columbus office of McLaughlin Bros. aside from this Exhibit 8. Q. You may state to the jury what is referred to in this letter, marked 'Exhibit 9,' in the introductory portion which says: 'Your letter of the 28th ult., addressed to our Columbus office is received.' You may state to what that refers. Mr. Morling: We object to that as calling for the witness's conclusion. (Objection sustained. Defendants except.) Witness: I got this letter marked 'Exhibit 9' out of the mail box in the regular course of mail at Scranton, Iowa, free delivery. Q. State whether or

Digitized by Google

not that was in reply to this statement of the 28th of July. Mr. Morling: Objected to as calling for conclusion of the witness. (Objection sustained. Defendants except.) Mr. Henderson: We now offer in evidence Exhibit 9. We now offer in evidence Exhibit 8. Mr. Morling: Objected to as incompetent, irrelevant, and immaterial, and not a sufficient foundation, and not the best evidence. (Sustained on the last ground.)" The objections should have been overruled, and the letter admitted in evidence. The identification of the letter as part of a certain correspondence and the pointing out or identification of its subject-matter by parol violates neither the rule which excludes the witnesses' conclusion nor the rule which excludes parol testimony to vary the terms of a writing. Moreover, it is the established rule in this State, as it is in most jurisdictions, that letters received by a party to the suit through the mails purporting to have been addressed to him by the other party with reference to matters relevant to the controversy, and in response to letters written by said first party, are admissible in evidence without further proof of their authorship. Davis v. Robinson, 67 Iowa, 363, 25 N. W. 280; Lyon v. Assurance Co., 46 Iowa, 631; Bullis v. Easton, 96 Iowa, 513, 65 N. W. 395; Boykin v. State, 40 Fla. 484, 24 So. 141; Connecticut v. Bradish, 14 Mass. 296; Bank v. Geisthardt, 55 Neb. 232, 75 N. W. 582; Armstrong v. Advance, 5 S. D. 12, 57 N. W. 1131; Scofield v. Parlin, 61 Fed. 804, 10 C. C. A. 83. There was error, therefore, in excluding the offered testimony. Other rulings on evidence are complained of; but, while we think some of the objections are sound, the same question will not necessarily arise on a retrial, and their discussion would unduly prolong this opinion.

2. Neither can the order directing a verdict for plaintiff be sustained on the further proposition advanced by counsel, that the alleged representations were of an immaterial character. In the first place, the plea of false representations was not assailed by motion or demurrer, but issue was taken thereon, and the cause tried in the court below on the theory that the issue so voluntary joined presented something for trial. Some of our cases seem to hold that failure to assail the sufficiency of such pleading in the trial court is such a waiver of the objection notwithstanding our statute that it cannot be made available in this court. Ormsby v. Graham, 123 Iowa, 211, 98 N. W. 724, and cases there cited. But, whether this rule be sound or unsound, we are satisfied that the alleged representations that the horse had but recently been imported from France and had never been used for breeding purposes in this country was of a material character; and, if, as claimed by defendants, such representation was false and at the date thereof the horse had been a long time in this country, had been previously sold by the vendors and returned to them by the purchasers because of its lack of breeding capacity, it was sufficient to justify a rescission of the purchase upon the discovery by the defendants of the fraud so perpetrated. Moreover, the alleged representation that the certificate written in French which the purchasers were unable to translate or read for themselves contained the record of the horse with respect to his foal-getting capacity had a material bearing upon its value for the purposes for which it was being purchased, and, if false, was well calculated to mislead persons or ordinary prudence.

3. Relying upon the rule applied in Morton v. Morton, 10 Iowa, 58,

Digitized by Google

that, if a defense jointly pleaded by several defendants is insufficient as to one of them, it is insufficient as to all, the appellee contends that the failure of defendants to prove that the alleged false representations were made to each individual leaves the defense based thereon without any support. This argument involves a misconception of the effect or at least the extent of the rule. The Morton Case presents an instance in which one of the defendants being a married woman her co-defendants, who were under no disability, sought to plead and obtain the benefits of her coverture. The decision there announced goes no further than to say that a defense which is personal to one defendant, like coverture or minority, or other lack of capacity to contract, is not available to his co-defendants. With that conclusion we have now no quarrel. But, where the proffered defense goes to the merits of the case or to the substance of the contract sued upon, it may be pleaded by all of the defendants, or, if pleaded by one of them, it inures to the benefit of all. This distinction was expressly recognized in the case of Morrison v. Stoner, 7 Iowa, 493. See, also, Hall v. Rochester, 3 Cow. (N. Y.) 374; Morton v. Crogham, 20 Johns. (N. Y.) 122; Blodget v. Morris, 14 N. Y. 491; Harrison v. Wallton, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Miller v. Longacre, 26 Ohio St. 291; Campbell v. McHarg, 9 Iowa, 354. In Hall v. Rochester, supra, a case cited approvingly by this court in Morrison v. Stoner, the action was upon a promissory note, and the defense advanced by one defendant that the note had been procured by fraud was held to inure to the benefit of all of the makers, including those who had suffered default to be taken against them. It is argued, however, if we understand counsel correctly, that the defendants were not joint purchasers of the horse, but separate and independent purchasers of distinct shares therein, and that in such case a good defense as to one purchaser may not be good as to others. The evidence as to the scheme or plan of the purchase is not very clear, but it is certain that the note is a joint contract, on which all are liable either as principal makers or as sureties for their co-makers, and, if such be the case, a defense which goes to the plaintiff's right of recovery in whole or in part may be shown whether the plea be made jointly or severally. Morrison v. Stoner, supra. It is a general rule that the liability of a surety is not greater than that of his principal. And he may have the benefit of any defense which the principal pleads or could plead, subject, of course, to the limitation recognized in the class of cases of which Morton v. Morton, supra, is a type. Henline v. Reese, 54 Ohio St. 599, 44 N. E. 269, 56 Am. St. Rep. 736; Eising v. Andrews, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75. Applying this rule in an action upon a promissory note, it has been held that the surety may show failure of consideration for the note, and may show that the note was tainted with fraud in its inception, and that the sale for which it was given has been rescinded. Stockton v. Giddings, 96 Cal. 84, 30 Pac. 1016, 21 L. R. A. 406, 31 Am. St. Rep. 181. "Fraud and deceit in inducing the principal to make his promise will release the surety, as these affect the character of the debt." Winn v. Sanford, 145 Mass. 302, 14 N. E. 110, 1 Am. St. Rep. 461; Ohio T. E. Co. v. Hensel, 9 Ind. App. 328, 36 N. E. 716. We do not, however, concede that the defendants were not joint purchasers of the horse. They seem to have united in a some-

Digitized by Google

what informal association for the purpose of making the purchase. The seller was not offering or proposing to sell any share or interest in the horse except on condition that enough purchasers were found to take the entire ownership. When the required number was found, the entire title was transferred, and all the purchasers united in making the note; and, while as between themselves it was doubtless understood that each owned a share or fractional interest in the horse, such fact is not inconsistent with the theory of joint purchase. The technical legal effect of the transaction, whether it served to make the defendants joint purchasers, or partners, or principals as to their several fractional shares of the price and sureties as to the remainder, is in our judgment a question unnecessary to decide. In either case we think that false representations operating to induce the purchase, though not made directly to each and every individual purchaser, would afford good ground for a rescission of the purchase, and that proof of such rescission would constitute a good defense to an action on the note in the hands of any person charged with notice of the fraud.

4. It is finally insisted that the good-faith character of plaintiff's ownership of the note is to be conclusively presumed, or that it was so clearly established by the evidence that the court could not do otherwise than direct a verdict against the appellants. We feel constrained to hold that it was a question for the jury. As we have already said, there was evidence for the jury upon the question whether the note was procured by false representations. If this question should be determined in the affirmative (and there was evidence from which the jury could so find), then the instrument was tainted with fraud in its inception, and the presumption of good faith which ordinarily attaches to the purchase of negotiable paper before due no longer obtains, and the burden would in such case be upon the plaintiff to show that it received the paper in due course and without notice of the defense. See McKnight v. Parsons, (Iowa) 113 N. W. 858, and cases there cited. On the record before us we are not prepared to say that the showing is sufficiently conclusive to require us to hold that the appellee's good-faith ownership of the note has been established as a matter of law.

It follows from the foregoing that a verdict should not have been directed, and a new trial must, therefore, be ordered.

The judgment appealed from is reversed.

Digitized by Google

Decision No. 1137.

THE NATIONAL EXCHANGE BANK OF ALBANY, Respondent, v. WILLIAM LESTER, Appellant.

87 N. E. 779.

An indorser of a promissory note complete in form when indorsed, which has been fraudulently raised after indorsement, is not liable thereon to a bona fide holder for the increased amount, although at the time of indorsing there were spaces in front of the figures and the writing which rendered forgery easy. The presumption that some one having possession of the note will commit forgery, obligating the indorser to guard against it, is not to be recognized.

Appeal by the defendant from a judgment of the Appellate Division of the Supreme Court in the Third Department, entered on the 16th day of May, 1907, which affirmed a judgment entered on a verdict in favor of the plaintiff at a Trial Term of the Supreme Court in Albany county.

The defendant was sued as the accommodation indorser upon a note for $375, made by one Frank L. Fancher and acquired by the plaintiff bank before maturity in the regular course of its business.

The defense was that the note as originally made and indorsed was for $75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "three hundred" immediately in front of the words "seventy-five," and the figure "3" immediately in front of the figures "75," thereby making the instrument apparently a note for $375 instead of $75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff bank. The answer prayed judgment that the complaint be dismissed, except as to the amount of the note before alteration, together with interest and protest fees, to wit, $78.66. The defendant also served an offer to allow the plaintiff to take judgment for that amount.

Upon the trial the court charged the jury that if the note indorsed by the defendant was in fact a note for $375 on its face, the plaintiff was entitled to recover that amount and interest.

The trial judge further charged the jury that if they found that there were spaces upon the note "so carelessly and negligently left by this indorser, Mr. Lester, that a person having custody of the note might run in a figure "3" and the words "three hundred" so as not to occasion in the mind of the indorser (evidently meaning indorsee) any inquiry into its validity," they might find that the indorser con-

Digitized by Google

ducted himself carelessly and negligently in the premises, and thus invited the liability which the face of the note called for when presented to the bank.

The defendant duly excepted to that part of the charge to the effect that if the defendant was negligent in leaving blank spaces the jury must find a verdict for the plaintiff for the full amount of the note as it stood. The court then reiterated the proposition, saying that "if the jury find that the defendant was careless and negligent in leaving vacant spaces for the words and figures, such carelessness and negligence on his part would still make him liable for the note;" and to this the defendant also excepted.

The jury found for the plaintiff in the sum of $375, with interest. The judgment entered upon the verdict has been unanimously affirmed by the Appellate Division.

W. A. Hendrickson. for appellant. Frederick Townsend, for respondent.

WILLARD BARTLETT, J. As this case went to the jury, they might well have found that the note in suit was a note for only $75 when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for $375 when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmitted from a note for $75 into a note for $375. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect it had indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

In support of the correctness of this ruling the learned counsel for the respondent asserts the doctrine that "a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled facilitating an alteration raising the amount, is liable for the face of the note as raised to an innocent holder for value," and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska and Pennsylvania.

In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only, because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to bona fide holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been

Digitized by Google

filled, on the doctrine of implied authority, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note as increased by filling up the unoccupied spaces therein is placed upon the doctrine or negligence or estoppel by negligence.

The cases cited by respondent in which parties to commercial paper executed by them while obvious blanks remained unfilled thereon have been held liable upon the instrument as completed by filling out such blanks, on the ground of implied authority, require no further consideration here, as there is no suggestion that there was any blank of this character upon the note in suit. These cases are Winter & Loeb v. Pool, 104 Ala. 580; Stanton v. Stone, 61 Pac. (Colo.) 481; Cason v. Grant Co. Deposit Bank, 97 Ky. 487; and Weidman v. Symes, 120 Mich. 657. There were obvious blanks also in the notes under consideration in Visher v. Webster, 8 Cal. 109, and Lowden v. National Bank, 38 Kans. 533, and the decision in each of these cases appears to have proceeded upon the doctrine of implied authority rather than negligence.

It must be frankly conceded, however, that the respondent find support for the doctrine which it asserts in the case at bar in the decision of Pennsylvania, Illinois and Missouri, so far as the maker of commercial paper is concerned, and in those of Kentucky and Louisiana, in respect to the liability of a party who has indorsed or become surety upon a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions enlarging the amount. Garrard v. Hadden, 67 Pa. St. 82; Yocum v. Smith, 63 Ill. 321; Scotland Co. Nat. Bank v. O'Connel, 23 Mo. App. 165; Hackett v. First Nat. Bank of Louisville, 114 Ky. 193; Isnard v. Torres & Marquez, 10 La. Ann. 103.

In Garrard v. Hadden, supra, a space was left between the words "one hundred" and the word "dollars" in which "fifty" had been inserted after the maker had signed and delivered it, and the court held the maker answerable to a bona fide holder for the full face of the note as altered, on the ground of the negligence of the maker in leaving the space in the note which was thus filled up after execution. "We think this rule is necessary," said Chief Justice Thompson, "to facilitate the circulation of commercial paper and at the same time increase the care of drawers and acceptors of such paper, and also bankers, brokers, and others in taking it." It is a little difficult to see how the rule tends to make bona fide purchasers more careful, as this last observation suggests.

The case of Yocum v. Smith, supra, held the maker liable upon a note which had been raised after execution from $100 to $120, the words "and twenty" having been inserted in a space left between the word "hundred" and the word "dollars." The court said that the maker had acted with unpardonable negligence in signing the note and leaving a blank which could so easily be filled; that he had thus placed it in the power of another to do an injury, and that he must, therefore, suffer the resulting loss. This decision undoubtedly sustains the position of the respondent, although there was another element of negligence in that case which is not present here. It appeared that the maker there was informed by letter by the purchaser, very soon after the date of the note, that he had bought it and of its date and amount, yet he made no objection as to the amount until nearly a year later.

Digitized by Google

In Scotland Co. Nat. Bank v. O'Connel, supra, the defendants executed and delivered a note for $100 to one Smith, the body of which was in his handwriting, in a condition which enabled him to add the words "Thirty-five" after "one hundred" in the written part and put the figures "$135" at the head of the note in the space where the amount is usually indicated by figures. The St. Louis Court of Appeals held that the defendants were liable for $135 because they had delivered the note to Smith, who was their co-maker, "in such a condition as to enable him to fill blank spaces without in any manner changing the appearance of the note as a genuine instrument."

The cases thus far discussed were all of them actions against the makers of the raised paper. The same rule, however, was applied against an indorser in Isnard v. Torres & Marquez, supra, by the Supreme Court of Louisiana under the following circumstances: Marquez indorsed a note for $150 for the accommodation of Torres. The amount was raised to $1,150 and purchased by the plaintiff in good faith as a note for that sum. The report states that there was testimony of experienced persons to the effect that if at the time of the indorsement the word onze (for eleven, the note being in French) and the additional figure before 150 were not there "the note would have exhibited blanks which at least with regard to the written part were unusual and calculated to attract attention, and would have rendered the note unsalable in the market." In this opinion, upon inspection of the note, the court expressed its full concurrence. The indorser was held liable for the amount of the note as raised, on the ground that he had not exercised proper caution. To the same effect is Hackett v. First Nat. Bank of Louisville, supra, where it was held that a surety who had signed a note in which were written the words "five hundred" with spaces before and after them, which the maker had filled up by writing "twenty" before and "fifty" after them, thereby making a note for $2,550, was liable thereon to a purchaser in good faith. In this case the attention of the Kentucky Court of Appeals was called to the fact that the great weight of authority was the other way, but in view of the fact that the rule had been so established in Kentucky for a quarter of a century the court determined to adhere to it in observance of the principle of stare decisis.

This court is not thus constrained. The question involved in the present appeal has not been authoritatively decided in this State, and we are at liberty to adopt that view of the law which seems to us most consonant with sound reason and best supported by well-considered adjudications in other jurisdictions.

The outcome of these adjudications is accurately set forth, as it seems to me, by Mr. Randolph in his treatise on the law of Commercial Paper, as follows:

"Where negotiable paper has been executed with the amount blank it is no defense against a bona fide holder for value for the maker to show that his authority has been exceeded in filling such blank and a greater amount written than was intended. This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount, which made it easier for a holder to enlarge the sum first written. It has now, however, become in America an established

Digitized by Google

rule that if the instrument was complete without blanks at the time of its delivery the fraudulent increase of the amount by taking advantage of a space left without such intention . . . will constitute a material alteration and operate to discharge the maker." 1 Randolph on Commercial Paper, § 187. The rule thus stated is sustained by the decision of the courts of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas, and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine and accords better with such adjudications of this court as bear more or less directly on the question involved.

The leading case sustaining this view is Greenfield Sav. Bank v. Stowell, 123 Mass. 196, in which the opinion was written by Chief Justice Gray, afterward an associate justice of the Supreme Court of the United States. The discussion is careful and exhaustive, reviewing all the important cases in England and America bearing upon the subject which had been decided up to that time (1877), including that of the Supreme Court of Pennsylvania in Garrard v. Hadden, supra, which was the principal authority the other way. I shall not undertake to review the same authorities here or paraphrase the opinion of Chief Justice Gray, which deals with them in such a manner as fully to justify his rejection of the doctrine that the makers of a promissory note apparently complete when they sign it are liable for an amount to which it may subsequently be raised, without their knowledge or consent, on the ground that they were negligent in permitting spaces to remain thereon in which the figures and words which effected the increase could be inserted. In support of his conclusion, however, he quotes some passages from the opinion of Christancy, J., in Holmes v. Trumper, 22 Mich. 427, which will bear repetition as suggestive of some of the reasons why the forgery of a promissory note should not be held to create a contract which the party sought to be charged never consciously made himself or authorized anybody else to make in his behalf. Speaking of the alleged negligence in leaving spaces on the note, Mr. Justice Christancy said: "The negligence, if such it can be called, is of the same kind as might be claimed if any man in signing a contract were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument. . . . Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery, in whatever mode it may be accomplished, and unless, perhaps, when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it and of the intermediate holders."

While a general reference to the cases cited and reviewed by Chief Justice Gray in Greenfield Sav. Bank v. Stowell, supra, will suffice, there are some later decisions to which attention may be called. In Knoxville National Bank v. Clark, 51 Iowa, 264, will be

Digitized by Google

found a strong and well-reasoned opinion against holding a party to a note which has been fraudulent raised, after it left his hands, liable for negligence, because when he executed the instrument there were spaces left thereon (not being obvious blanks designed to be filled) which would permit of forgery. The trial court had rendered judgment against the maker for the amount of the note as raised from $10 to $110 on a finding of negligence in leaving a space before the word "ten" and the figures "10." "On this ground," said the Supreme Court of Iowa, "the court proceeded and the decision is based on the reasoning of the civil lawyers. But could it be anticipated that such negligence would cause another to commit a crime, and can it be said a person is negligent who does not anticipate and provide against the thousand ways through or by which crime is committed? Is it not requiring of the ordinary business man more diligence than can be maintained on principle or is practicable if he is required to protect and guard his business transactions so that he cannot be held liable for the criminal acts of another? If so, why should not the negligence of the owner of goods which are stolen excuse the bona fide purchaser? And, referring to the argument that such a measure of liability is required to promote the free interchange of commercial paper (a view which seems to have been influential in the Pennsylvania case of Garrard v. Hadden), the court well said: "At the present day negotiable paper is not ordinarily freely received from unknown persons. Forgeries, however, are not confined to such. But the necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made and which it is proposed to fasten on him because some one has committed a forgery or other crime."

In Burrows v. Klunck, 70 Md. 451, the Maryland Court of Appeals emphasizes the distinction between a note in blank as to the amount, when signed and delivered to another for use, and a note complete on its face when signed and delivered in which has been written the sum payable, the date, time of payment, and name of the payee. "In such case," it is held, "there can be no inference that the defendant authorized any one to increase the amount simply because blank spaces were left in which there was room enough to insert a larger sum."

No one questions the proposition that where a party to commercial paper intrusts it to another with a blank thereon designed to be filled up with the amount such party is liable to a bona fide holder of the instrument for the amount filled in, though it be larger than was stipulated with the person to whom immediate delivery was made. Van Duzer v. Howe, 21 N. Y. 531. So also a note executed with a blank therein for a statement of the place of payment is not avoided in the hands of a bona fide holder for value by the insertion in the blank of a place different from that agreed upon by the original parties. Redlich v. Doll, 54 N. Y. 234. But where there is no blank for that purpose when the note is indorsed, the insertion of an obligation to pay interest is a material alteration which invalidates the instrument as against the indorser. McGrath v. Clark, 56 N. Y. 34. In the case last cited the note when indorsed ended with the word "at," followed by a space in which the maker, after indorsement, inserted a place of payment, adding the words "with interest;"

Digitized by Google

but no suggestion appears to have been made that because the space left was large enough to allow the insertion of these words, the indorser was negligent and could be charged with the amount of the note, including the interest, on that ground. On the contrary, as the law then stood, he was relieved of all liability whatever as the effect of the unauthorized alteration. Now, however, under the Negotiable Instruments Law, § 205, he would be liable on the paper according to its original tenor.

To sustain the judgment in the case at bar, in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised after indorsement by means of a forgery, is liable upon the instrument in the hands of a bona fide holder for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence; for the action is not in tort for damages, but upon the contract as expressed in the note. But apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed and upon what seems to be considerations of sound reason, independent of judicial authority. An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects — as to date, name of payee, time and place of payment, and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument — in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business. That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true and is evidenced by the cases in the law reports which we have had occasion to refer; but that such misconduct is the rule or is so general as to justify the presumption that it is to be expected, and that business men must govern themselves accordingly, has never yet been asserted in this State, and I am not willing to sanction any such proposition, either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. See

Digitized by Google

Bradish v. Bliss, 35 Vt. 326. As was said by Judge Cullen in Critten v. Chemical Nat. Bank, 171 N. Y. 219, 224, it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case.

I think the judgment of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., GRAY, HAIGHT, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

Decision No. 1138.

PEOPLE v. GORHAM.

(Court of Appeals, Second District, California. Nov. 14, 1908.)

99 Pac. 391.

FORGERY — "CHECK OR INSTRUMENT FOR PAYMENT OF MONEY" — WHAT CONSTITUTES — BILLS AND NOTES — OMITTING NAME OF PAYEE — EFFECT AS TO CHECK.

1. Leaving blank the name of the payee of a check gives to any bona fide holder for value implied authority to fill the blank with his own name or that of a third person, and so, likewise, where all that was required to make a check out of a forged instrument delivered by defendant in payment was the insertion of the name of the payee, the delivery constituted the transferee defendant's agent with authority to fill in the blank with its own name; and a claim that the instrument was not a check or an instrument for the payment of money within the meaning of Pen. Code, § 476, when passed by defendant, is without merit.

2. Where the name of the payee is left blank in a check, the effect of such paper until the name of the payee is inserted pursuant to authority conferred on the receiver by its delivery for value is that it is payable to the bearer, and passes from hand to hand by mere delivery.

3. That an instrument does not designate any payee does not raise a presumption that it is in circulation without authority, and one who accepts it in that condition need not at his peril ascertain whether the person tendering it has authority to complete it or to authorize another to do so, but, on the contrary, bills and checks are often executed in full, with the exception of the name of the payee, which is left blank, that it may be afterwards filled up with the name of the actual holder who demands payment.

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Dorothy Gorham was convicted of forgery, and she appeals. Affirmed.

Noleman & Smyser, for appellant. U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for the People.

Digitized by Google

SHAW, J. As disclosed by the record, defendant negotiated for the purchase of a piano from the Wiley B. Allen Company at an agreed price of $350. In payment therefor she gave to the salesman an instrument which purported to be signed by Mrs. S. M. Dimmick, whom she represented to be her sister, and for whom she was purchasing the piano. This check when handed to the salesman was in the following form:

"Los Angeles, Cal., ... March 10, ... 1908.. No. .. 9..
"The Farmers and Merchants National Bank
of Los Angeles. Pay to
.... or order $..400..
..... Four Hundred .....Dollars.
MRS. S. M. DIMMICK....."

As a reason for presenting the check for a sum in excess of the required amount and with the name of the payee left blank, she stated that her sister was ill and had given her the check, not knowing from whom nor at what price she would make the purchase, but limiting the price to not exceeding $400. Defendant was requested to fill in the blank space with the name of the payee, but declined to do so, saying it was customary to stamp that in. The salesman took the check to the office on the same floor, where the manager stamped the name of the Wiley B. Allen Company in the space left blank for the name of the payee. Upon inquiry made at the bank, during which time defendant was detained at the store, it was ascertained that the check was fraudulent, both as to the signature and absence of money deposited in the bank to account of Mrs. Dimmick. The manager then presented the check, with the name of the payee stamped therein, to defendant, who, holding one end of it while he retained the other, was asked if it was not possible that a mistake had been made, and she said that the check was good. She was then placed under arrest, and stated that she had found the check, and that her name was not Martin, as she had represented, but Gorham. The piano was not delivered, nor was any money paid to defendant on said check. The check, as alleged in the information, and which defendant is charged with uttering, publishing, and passing, and that was offered in evidence in support of said allegation, had inserted therein as payee the name of the Wiley B. Allen Company. Defendant was convicted as charged, and appeals from the judgment and an order denying her motion for a new trial.

The ground upon which appellant bases her right to a reversal is the fact that the check at the time it was delivered to the Wiley B. Allen Company did not contain the name of the payee; hence, it is claimed the instrument was not a check or other document within the meaning of section 476 of the Penal Code, and that there was a fatal variance between the allegation in the information and proof offered in support thereof. It may be, as contended by appellant, that the instrument did not constitute a check until the name of the payee was inserted therein (Rex v. Richards, Russell & Ryan's [Eng.] Repts. p. 192; Rex v. Randall, Id. 195), though the contrary doctrine seems to prevail in the State of Indiana (Harding v. State, 54 Ind. 359). In any event, all that was required to make the instrument a check was the insertion therein of the name of the payee, and the filling in of such blank may be made by any one

Digitized by Google

authorized so to do. When so filled, it relates back to the time of its delivery. Such authority may be conferred under an implied agency created by the maker's act in putting the paper into circulation. "Leaving such blank for the name of the payee gives to any bona fide holder for value an implied authority to fill the blank with his own name, or with that of a third person." Randolph on Commercial Paper, § 185; Rich v. Starbuck, 51 Ind. 87. By voluntarily delivering the instrument in question to the Wiley B. Allen Company in payment of the purchase price of the piano, defendant constituted the company her agent with authority to fill in the blank space with its own name, or that of any third person to whom said company as holder might transfer it. In legal effect, it was her act, and made the check just what she designed it to be. The effect of such paper until the name of the payee is inserted pursuant to the authority conferred upon the receiver by its delivery for value is that it is payable to the bearer and passes from hand to hand by mere delivery. Under our view there is no merit in appellant's contention.

It is apparent from the foregoing views that the court did not err in instructing the jury as follows: "A check or order for the payment of money, however duly executed in other respects, but having the name of the payee omitted therefrom and delivered in that condition by the maker, carries with it the authorization of the maker to the intended payee to supply the name of such intended payee, or the name of any other person to whom the intended payee may deliver the check or order with the intent to pass title thereto."

We cannot agree with appellant that "the fact that the instrument does not designate any payee at once raises the presumption that it is in circulation without authority, and one who accepts it in that condition must at his peril ascertain whether or not the person tendering it has authority to complete it or to authorize another to do so." On the contrary, bills and checks are often executed in full, with the exception of the name of the payee, which is left blank in order that it may be afterwards filled up with the name of the actual holder, who demands payment. Daniel on Negotiable Instruments, § 145.

We find no prejudicial error in the record, and the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; TAGGART, J.

Decision No. 1139.

KIPP v. SMITH et al.

(Supreme Court of Wisconsin. Dec. 15. 1908.)

118 N. W. 848.

BILLS AND NOTES — ACTIONS — QUESTIONS FOR JURY — BONA FIDE PURCHASERS — "BAD FAITH" — RIGHTS ON TRANSFER — "HOLDER IN DUE COURSE."

1. Where there was circumstantial evidence that the holder of a note had knowledge of the business of the original payees and of the circumstances under which the note, and others which he purchased, were given, it was proper to submit to the jury the question whether he was a holder in due course.

Digitized by Google

2. Gross negligence, on the part of one to whom a note is negotiated, in not making inquiry as to defects suggested by the facts known to him, is evidence from which "bad faith," as used in the Negotiable Instruments Law (Sanborn's St. Supp. 1906, §§ 1676–26), may be inferred, but it does not of itself constitute bad faith as a matter of law.

3. In order that one may be a holder of a note in due course, he must take it "in the usual course of business."

4. One who takes in payment of a private debt the note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularity that may exist in its execution.

5. An exclusive right to sell a non-patented article in a given territory may be a valuable privilege constituting a good consideration for notes for such right, though neither party can prevent others from invading the territory; and where the evidence does not show without controversy that such right is of no value, or that the contract was induced by fraudulent representations of fact, the existence of the consideration for the notes is a question for the jury.

Appeal from Circuit Court, Brown County; Samuel D. Hastings, Judge.

Action by B. A. Kipp against Irving C. Smith, as executor, and others. From a judgment for defendants, plaintiff appeals. Reversed.

This is an action upon a promissory note for $250, which was one of four notes executed by Howard J. Smith (respondent's testator) and William L. Pfeiffer to the Advance Fire Appliance Company, a partnership, on October 31, 1903. The partnership was composed of one Scheuer and one Weinsheimer, and was engaged in manufacturing and selling an unpatented dry compound for extinguishing fires, prepared from a secret formula and known as "Blaze Killer," and which was put up in tin tubes having on the outside a design composed of a shield and trefoil with the words "Blaze Killer" thereon, which was labeled a trade-mark, but never recorded or copyrighted. The compound had been upon the market since its discovery in 1899 by one Schaffer, and had attained some general sale. The consideration of the notes (which in all amounted to $950) consisted in the agreements of a written contract executed on the same day by the parties. This contract recited that whereas the defendants had purchased from the first parties and paid for "the right and privilege for the exclusive sale of its fire extinguisher (Blaze Killer) in Brown county, Wis., it was agreed;" then followed a statement of the fixed price per dozen, viz., six dollars, at which for a term of ten years the first parties were to sell the Blaze Killer to defendants in any quantity the defendants might wish; an agreement that, should the first parties sell any Blaze Killers to any one within the said county, they would maintain a price five times as great as that charged the defendants, and pay to defendants the difference monthly; a provision that no sales should be made by defendants outside of the territory, but, if any were made, that defendants should pay to the first parties one-half of the sums received in excess of the contract price; also a provision that the contract should become void in case three dozen were not sold by defendants in any year; and a further provision giving the defend-

Digitized by Google

ants one-half of the amount paid for exclusive agency rights in other territory by any purchaser whom they obtained.

Soon after the contract was made, a domestic corporation was formed, of which Scheuer became president, and the partnership transferred to the corporation all its business and property, including the note in suit, which was specially indorsed by the partnership to the order of the corporation without recourse. On December 2, 1903, the defendants surrendered the previous contract to the corporation, and received in exchange a new contract executed by the corporation and themselves, which was intended to take the place of the previous contract. It stated that the corporation had appointed the defendants its agents for the sale of Blaze Killer and such other articles as it might place on the market, and that it sold to the defendants the "exclusive privilege for the sale of its extinguishers and other goods" in Brown, Calumet, and Oconto counties. This agreement fixed the prices at which Blaze Killer should be furnished to defendants up to January 1, 1921, at six dollars per dozen for cash, but in case notes had been given for territorial rights, then the price should be $13.50 per dozen cash, of which $7.50 was to be indorsed on the notes until the notes were fully paid, after which the price was to be six dollars. It contained the same stipulation as the former agreement as to the prices which the corporation would maintain, and the amounts which it would pay to the defendants in case it sold Blaze Killer to any other persons within the territory, with a proviso that, in case such sales were made by any agent working for the corporation under a similar contract, the defendants should rely only on the agreement of such agent to turn over to the corporation, for the benefit of defendants, one-half of the amount of such sales exceeding six dollars per dozen. It also contained a stipulation that if defendants sold any Blaze Killer outside of their territory they would report same to the corporation, and turn over to its monthly one-half of the amounts so received in excess of six dollars per dozen, for the benefit of the agents having the right to such territory, failure to do which should ipso facto terminate the contract. It also contained like provisions as to the termination of the contract in case three dozen were not sold in any year, and as to the amount to be paid to defendants in case they secured a purchaser for additional territory, except that such amount was to be twenty-five per cent. of the proceeds instead of one-half.

The note in suit was payable one year after its date, and on the 7th of May, 1904, the plaintiff received it from Scheuer, in payment of a personal obligation to him from Scheuer, and it was then indorsed: "Pay to B. A. Kipp without recourse, Advance Fire Appliance Company by Joseph F. Scheuer, Prest., F. L. Grieb, Secy." The plaintiff claimed to be a bona fide holder before due, but the defendants claimed that he took the note with knowledge of the facts, and that there was in fact no consideration for it. The trial court held as matter of law that there was no consideration, and submitted to the jury the single question whether the plaintiff bought the note in the usual course of business in good faith, for value, and without notice of what it was given for. The jury answered this question in the negative, and, judgment being rendered for the defendants, the plaintiff appeals.

Digitized by Google

Sheridan & Evans and Paul D. Durant, for appellant. Cady, Strehlow & Jaseph, for respondents.

WINSLOW, C. J. (after stating the facts as above). There was no direct evidence showing that the plaintiff knew the nature of the consideration given for the note in suit, but there was much evidence of a circumstantial character tending to show that he had considerable knowledge of the business in which the original payees of the note were engaged, and of the circumstances under which this note, and others which he purchased at the same time, were given. There was no error, therefore, in submitting the question whether the plaintiff was a holder in due course to the jury, but the serious question on this branch of the case is as to the correctness of the charge of the court.

The court instructed the jury in substance that, if the plaintiff had notice of facts which would put a man of ordinary intelligence and prudence upon inquiry, he would be charged with knowledge of the facts which the inquiry would have shown; and that, if he was guilty of gross negligence in not following up the inquiry which facts known to him suggested, the law would charge him with notice of all the facts which he might have ascertained by the inquiry, and that he could not be a purchaser in good faith. This, we think, was error. The Negotiable Instrument Law (Sanborn's St. Supp. 1906, § 1676–26) provides that, "to constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his taking the instrument amounted to bad faith." By the great weight of modern authority, gross negligence is evidence from which bad faith may be inferred, but it does not of itself constitute bad faith as matter of law. That is a question for the jury, after consideration of all the evidence. 1 Daniel, Negotiable Instruments, §§ 774 and 775, and cases cited in notes; 4 Am. and Eng. Encyc. of Law (2d ed.) 300; 7 Cyc. 944 and 945. Such is substantially the rule adopted by this court in Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697, and Boyle v. Lybrand, 113 Wis. 83, 88 N. W. 904.

Another question has presented itself to our minds in this connection which seems worthy of very serious consideration, but as it was not raised or argued in either court, and is not necessary to be now decided, we express no opinion upon it. The question is this: Can a person be said to be a holder in due course who, without inquiry, takes from an officer of a corporation, in payment of a private debt, a negotiable note, which appears on its face to be the property of the corporation? In order to be a holder in due course, he must take it "in the usual course of business." Is such a transaction in the usual course of business, in view of the principle that one who takes in payment of a private debt the promissory note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularity that may exist in its execution? Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111, and cases cited on page 116, 81 N. W. 1034. We merely suggest this question now. The case must go back for a new trial in any event, and upon such new trial the question of actual notice should again be submitted to the jury by

Digitized by Google

proper special question. Should the jury again find actual notice, the question above suggested will be immaterial, but, if they find to the contrary, the question above suggested can be answered by the court after due consideration and argument as the facts bearing upon it seem to be undisputed.

Upon the question of consideration the trial court held, as matter of law, that there was no consideration, because, the Blaze Killer not being a patented article, there could be no sale of exclusive territorial rights in it, and, as the defendants bought only territory or territorial rights, they received no consideration. We cannot regard this ruling as correct. It is true that, in the case of a non-patented article, there can be no such thing as the sale of territory or exclusive territorial rights in the sense in which those terms are used with regard to patented articles; but the sole agency for the sale of a non-patented article, in a given city or county, may be a desirable and valuable privilege, notwithstanding neither party can prevent others from invading the territory and selling the same or similar articles which they have purchased elsewhere. The value of the privilege will depend of course upon the desirability and good repute of the article, and the ease or difficulty with which it may be simulated or purchased elsewhere. Such selling rights in desirable non-patented articles are frequently given, and no reason is perceived why, in the absence of other grounds of invalidity, they may not constitute good consideration for promissory notes. Clark v. Crosby, 37 Vt. 188; Roller v. Ott, 14 Kan. 609; Keith v. Herschberg Optical Co., 48 Ark. 138, 2 S. W. 777.

The case of Apollinaris Co. v. Scherer, (C. C.) 27 Fed. 18, which was largely relied upon by respondent's counsel, holds nothing to the contrary of this doctrine. In that case the owner of a mineral spring in Europe had granted to the plaintiff the exclusive right of export and sale in this country of the mineral water. Third persons, however, purchased the water in Europe from the owner of the spring, and imported it to this country and sold it in competition with the plaintiff. The action was brought against these third persons to prevent them from doing this, but it was held that the owner of the spring could not grant any exclusive territorial right, which would prevent those who had lawfully purchased the water in Europe from bringing it to this country and selling it in competition with the plaintiff; but it is further said in the case that there would seem to be no doubt that the agreement was a valid agreement as between the parties, and that, if the owner of the spring were endeavoring to compete with the plaintiff in the sale of the water in this country, the agreement could be enforced by injunction.

Prima facie, therefore, there was a valuable consideration for the note, especially as there was testimony tending to show that Blaze Killer was an article which had acquired some general sale. It may perhaps be shown that the right was of no value, or that the contract was induced by fraudulent representations of fact, upon which the defendant relied; but neither of these facts appeared in the evidence without controversy, so that the court could take them from the jury.

Judgment reversed, and action remanded for a new trial.

Digitized by Google

Decision No. 1140.

WHITWELL v. WRIGHT et al.

(Supreme Court, Special Term, Ontario County. Feb. 3, 1909.)

115 N. Y. Supp. 48.

BANKRUPTCY — PREFERENCES — CONVEYANCE OF LAND — ADJUDICATION — CONCLUSIVENESS — BANKRUPT'S INTENT — NOTICE TO CREDITOR — BANKRUPTCY LAW — PURPOSE — CREDITOR'S KNOWLEDGE — EVIDENCE — SUFFICIENCY — SUIT TO AVOID.

1. A trustee in bankruptcy can recover land on showing that bankrupt was insolvent when he deeded it to defendant; that the transfer enabled defendants, as a creditor, to obtain a greater percentage of his debt than other creditors of the same class; that defendant had reasonable cause to believe that the conveyance was intended to give him a preference; and that the petition in bankruptcy was filed within four months after the deed was recorded.

2. In an action by a trustee in bankruptcy to avoid a deed by the bankrupt as an unlawful preference under the bankruptcy act, an adjudication of bankruptcy on the express ground that, when the deed was made within four months preceding the filing of the petition, bankrupt was insolvent, is conclusive against defendant grantee.

3. A creditor has reasonable cause to believe that a deed to him by insolvent was intended as a preference over other creditors if he had knowledge or notice of facts sufficient to put a reasonably cautious, prudent person upon inquiry.

4. The intent of the bankruptcy law is to equally distribute the assets of insolvents among their creditors and to prevent preferences and favoritism.

5. Evidence held to show that a creditor had reasonable cause to believe that a deed to him by insolvent was intended as a preference within the bankruptcy law.

6. In an action by a trustee in bankruptcy to avoid an unlawful preference, defendant creditor could introduce other parts of the record in the bankruptcy proceedings to show that the petition on which the adjudication was based was not the one received in evidence in such action, but, in the absence of such evidence, the court must assume that the petition acted upon by the bankruptcy court is the one produced; the trustee not being required to produce the whole record to have the benefit of the adjudication proved.

Action by Francis W. Whitwell, trustee in bankruptcy of Charles C. Gates, against Frank M. Wright and others, to set aside as unlawful preference under the Bankruptcy Act a deed made by the defendant Charles C. Gates and wife to the defendant Frank N. Wright of a farm of about 126 acres, situate in the town of Seneca, Ontario county, made on the 9th day of October, 1906. Judgment for plaintiff.

Lansing G. Hoskins, for plaintiff. George L. Bachman, for defendants.

FOOTE, J. The plaintiff is entitled to recover in this action if he has established that at the time the deed was made on the 9th day of October, 1906, Charles C. Gates, the grantor, was insolvent; that the effect of the transfer was to enable his creditor, Frank E. Wright, the grantee, to obtain a greater percentage of his debt than his other creditors of the same class; that Wright had reasonable cause to believe that it was intended thereby to give him a preference; and that the petition in bankruptcy upon which Gates was subse-

Digitized by Google

quently adjudged a bankrupt was filed within four months after said deed was recorded on the 12th day of October, 1906.

It is established by the testimony that the effect of the conveyance of this farm to Wright is to give Wright a greater percentage of his debt than any of Gates' other creditors will receive. Indeed, it paid in full his debt of about $8,000. That the petition in bankruptcy was filed within four months after the recording of the deed is shown by the certified copy of the petition introduced in evidence, which was filed on the 2d day of February, 1907, in the bankruptcy court. That Gates was insolvent at the time the deed was made the plaintiff contends is conclusively established by the adjudication in bankruptcy, and no other evidence was offered upon that subject, and, when the defendant offered testimony tending to show that Gates was not insolvent at the time this deed was made, it was excluded by the court on plaintiff's objection upon the concession then made by plaintiff's counsel that, unless the adjudication in bankruptcy was conclusive upon the question of Gates' insolvency at the time the deed was made, then plaintiff's case had not been proved or established as regards that question.

Upon the question as to whether Wright at the time he received this deed had reasonable cause to believe that it was intended to give him preference, the plaintiff relies chiefly upon the testimony of Gates as a witness, and the deposition of Wright, whose testimony was taken by commission, as well as upon the other facts and circumstances appearing in the record as to the financial condition of Gates and his confidential relation to Wright.

There are, therefore, but two questions to be considered which are debatable: First. Does the adjudication in bankruptcy establish conclusively as against the defendant Wright that Gates was insolvent at the time this deed was made? Second. Did Wright have reasonable cause to believe that it was intended to give him preference as a creditor?

The petition in bankruptcy alleges that Gates "is insolvent, and that within four months preceding the filing of this petition, to wit, on the 9th day of October, 1906, the said Charles C. Gates, while insolvent, committed an act of bankruptcy in that he did on said 9th day of October, 1906, transfer a portion of this property, to wit, certain real estate consisting of a farm situate in town of Seneca, county of Ontario, and State of New York, to one of his creditors, to wit, Frank N. Wright, with intent to prefer such creditor Frank N. Wright over his other creditors." No other act of bankruptcy is alleged in the petition. The adjudication, which was not made until the 21st of March, 1908, after the formal part which recites the filing of the petition, is as follows:

"And the said alleged bankrupt having appeared herein and filed an answer to said petition, and the issues so made having been referred to Mark T. Powell, Esq., as special master, to ascertain and report the facts with his conclusions thereon, and the said special master having filed his report finding that the said Charles C. Gates should be adjudged a bankrupt, and the exceptions filed to said report of the special master having been overruled, and the said report of said special master having been in all things duly confirmed by the court, the said Charles C. Gates is hereby declared and adjudged bankrupt accordingly."

Digitized by Google

The petition on which this adjudication was founded must be referred to to ascertain what is actually adjudicated, and we find the actual adjudication to be that Gates on the 9th day of October, 1906, being then insolvent, did commit an act of bankruptcy by making the deed in question to his creditor Frank N. Wright, with intent to prefer him over his other creditors. These facts are then conclusively established by this adjudication as against Gates. Are they also conclusively established as against the creditor Wright?

I find in the books a great variety of opinion upon this question. In some of the cases it is held that the adjudication is in rem and conclusive as to everybody as regards the essential facts necessary to be established to authorize the adjudication, and particularly as to all creditors of the bankrupt who are permitted by the bankruptcy law, if they choose, to appear and be heard in opposition to the adjudication. In other cases it is said that the rem involved is only the status of the individual proceeded against as a bankrupt, and not conclusive, except as between the immediate parties to the proceeding and such creditors as do appear upon the particular facts alleged.

Mr. Remington in his recent work on Bankruptcy has collected and reviewed with care and discrimination the decided cases, and as a result has incorporated these statements in the text of his treatise:

"The adjudication is binding upon all the world in subsequent litigations between the same adverse parties or their privies as to the status of the debtor as a bankrupt, and perhaps also as to the commission of the act of bankruptcy adjudicated and all essential facts involved in the determination of those two issues. . . ." 1 Remington on Bankruptcy, p. 283, § 444.

This he qualifies in the next section as follows:

"Perhaps, indeed, the true rule is that the adjudication in bankruptcy, though to be sure it is in a proceeding in rem 'binding on the whole world,' is not binding on others than those actually engaged in the litigation except as to the status of the debtor as a bankrupt; that the constructive presence of all creditors does not obtain except as to the subject of the debtor's status; that, therefore, except as to parties who have actually litigated the issues, the adjudication in bankruptcy is not binding in subsequent litigation on the matters of insolvency, nor even on the matter of the commission of the very act of bankruptcy on which the adjudication is based. . . ."

This learned author has collected under these sections a large number of decisions, mainly from the federal courts, which show the opposing views of different judges who have had the question under consideration, and so far as the federal reports are concerned I think the question is not authoritatively settled.

The question, however, has been passed upon recently by the Appellate Division of this court in this department in the case of De Graff v. Lang, 92 App. Div. 564, 87 N. Y. Supp. 78. In that case a judgment creditor, whose judgment was recovered within four months of the filing of the petition in bankruptcy, proceeded by execution to sell certain property of the bankrupt, and the trustee later appointed brought action against the judgment creditor to recover the amount so collected by that creditor and applied upon her judgment, and to prove that the bankrupt was insolvent at the time the judgment was recovered the plaintiff relied wholly upon the adjudication in bankruptcy which so adjudged. The court below held that that adjudica-

Digitized by Google

tion was not evidence of such insolvency as against the judgment creditor, and that such insolvency must be established by common-law proof. In reversing this decision it is said in the opinion of Presiding Justice McLennan:

"We think it should be held that the decree of the United States District Court put in evidence conclusively establishes for the purposes of this action that Fanny Meng was insolvent at the time the defendant recovered judgment against her and sold her property by virtue of the execution issued upon such judgment. Any other holding would lead to endless confusion in the administration of the law, and would in many cases nullify one of the principal purposes of the bankruptcy act."

This authority must be deemed controlling, and I feel bound to follow it in this case. Accordingly the insolvency of Gates at the time he made the deed in question must be held to be conclusively established against the defendants in this action by the adjudication in bankruptcy.

Did the defendant Wright have reasonable cause to believe that the conveyance of the farm to him was intended to give him a preference over other creditors? Under the authorities he did have such cause to believe, if he had knowledge or notice of facts sufficient to put a reasonably cautious and prudent person upon inquiry. The intent of the bankruptcy law is to make an equal distribution of the assets of insolvent persons among their creditors and to prevent preferences and favoritism. At the time of this transaction Gates was insolvent, and Wright's claim against him unsecured and uncollectible by any legal proceedings. The motives which should lead Gates to prefer Wright were strong, and both have strong motives of personal interest to sustain this transfer. In view of these conditions, the testimony of both Gates and Wright must be scrutinized, and must not be allowed to prevail as against undisputable facts and circumstances. The farm in question was of the value of about $10,000. Gates' indebtedness to Wright was $7,000, with about $1,500 of accrued interest; no interest having been paid for four or five years. This debt represented borrowed money. It began some twenty years before with a loan of $1,000 from Wright to Gates, and from time to time other loans were made the last being for $2,000, which was about four years before this transaction. Gates was a brother-in-law of Wright; Wright having married Gates' sister. Wright formerly resided in and near Geneva where Gates lived, but a few years before this transaction had changed his place of residence to St. Paul, Minn. He came down from St. Paul to Geneva on the 25th of September, 1906, and stayed there and in that vicinity for about three weeks, during which time this transaction was consummated. He stayed about a third of the time at the house of Mr. Gates as a guest. He brought with him from St. Paul in money or currency the $1,900 or $2,000 which he paid as the purchase price of this farm, in excess of the amount of Gates' debt to him. He also brought with him from St. Paul Gates' note for $7,000. Gates was the treasurer and principal financial manager and a stockholder of the Torrey Park Preserving Company, which carried on a canning and preserving business at Geneva, and in which Wright was also a stockholder to the amount of $1,100 from the beginning of its business. This company was in financial difficulties and went into the hands of a receiver in less than

Digitized by Google

four months after the transaction in question here, and was subsequently adjudged a bankrupt. Gates' principal asset, outside of this farm, was in this Torrey Park Preserving Company, which, in addition to his stock, owed him over $14,000 for back salary and borrowed money, and he was an indorser upon a large amount of its paper held in the banks at Geneva. Wright visited the office of the Torrey Park Preserving Company while he was at Geneva, and talked with its officers and employees, but says he did not inquire as to its financial condition, and did not know its financial condition. He did not visit the farm which he bought while he was there, except to drive along the road in going to another place. The negotiation for the purchase of the farm was, according to his testimony and Gates', of the briefest character, and it was agreed to on the second day after it was first mentioned. Wright accepted the first price suggested by Gates as the value of the farm, $10,000, and, until the transaction came to be closed, there was not a word said as to whether the notes which Wright held were to be paid or not in the transaction. No inquiry or examination was made as to Gates' title to the farm, except that Wright asked him if there were any liens upon it and he said there were not. When the deed was delivered, the notes which Wright had held were destroyed. The deed was taken to Canandaigua, the county seat, and recorded on the 12th day of October, but none of the tenants living on the farm and none of Gates' or Wright's friends or acquaintances in Geneva were informed of the transaction until Gates told it to an officer of one of the banks in Geneva about three months afterward. The tenant on the farm sent the check for the rent due in December to Gates, and Gates indorsed it, and forwarded it to Wright at St. Paul. The fire insurance on the buildings, about $6,000, was not changed, and Wright made no provision for insurance on the buildings until about the time in January when Gates informed the banker of the transfer. The reason given by Gates to Wright for wishing to sell the farm was that he had some debts that he wished to pay, or, as Wright states it, that he had some money he wished to pay. But Gates realized only about $1,900 in money from this sale; hence Wright must havs realized that Gates' financial condition was such that he felt obliged to resort to this valuable farm, which was free of incumbrance, to raise $1,900.

Wright did not attend the trial, but had his testimony taken at St. Paul by commission, and I have not had the benefit of his appearance as a witness on the stand.

On these facts I am impressed with the conviction that Wright prepared himself to make this or some similar transaction with Gates before he left St. Paul by providing himself with the currency and Gates' notes which would be needed, and that his carrying with him that amount of currency is a transaction so unusual at the present day as to suggest an intent to conceal the fact of such a transaction having taken place from the banks at Geneva, which might have been discovered had a check or draft been used; also, that there was an intentional concealment of the transaction after it was made for over three months by both Wright and Gates, and to that end the buildings on this farm were allowed to go unprotected by insurance against fire during that time, though Gates had carried $6,000 of such insurance.

The recording of the deed at Canandaigua would ordinarily indicate a contrary intent, but in this case it does not seem to have given notice

Digitized by Google

of the transaction to any interested party, and I think the parties may well have assumed that the fact would not be likely to become known in Geneva. But we must remember that it was necessary to record the deed. That was a risk that must be taken for bankruptcy would invalidate such a deed not recorded more than four months before filing the petition.

Giving due weight to all these facts and circumstances, it must be held that Wright knew of Gates' financial condition or purposely avoided informing himself, and that in either case he had notice of facts and circumstances sufficient to have put him upon his inquiry as to Gates' solvency.

It is suggested in the brief of defendants' counsel that some of the petitioners did not have provable claims, and that other creditors were allowed to join to supply this defect, but at a date after four months had expired, and that thus no valid petition was filed within four months, and that this would appear if the whole of the record in the bankruptcy court were produced. Undoubtedly it was the privilege of defendants' counsel to introduce other parts of that record, if he wished, to show that the petition on which the adjudication is based is not the one produced and received in evidence, but, in the absence of all such evidence, I must assume that the petition acted upon by the court is the one produced here from its records, and I am referred to no authority and am aware of none which requires the plaintiff to produce the whole record before he can have the benefit of the adjudication here proved.

These views lead to the conclusion that the plaintiff must prevail in this case. Costs are awarded to plaintiff, findings to be settled upon two days' notice.

Decision No. 1141.

TUMLIN v. BRYAN.

(Circuit Court of Appeals, Fifth Circuit. November 10, 1908.)

165 Fed. 166.

BANKRUPTCY — VOIDABLE PREFERENCE — SUIT TO RECOVER — INTENT OF DEBTOR.

1. In a suit by the trustee in bankruptcy of a partnership to recover payments made to a creditor as a preference, to authorize a recovery, it must be shown that the firm and the partners also were insolvent when the payments were made.

2. To render a payment made by a bankrupt to a creditor voidable as a preference under Bankr. Act July 1, 1898, § 60b, c. 541, 30 Stat. 562 (U. S. Comp. Stat. 1901, p. 3445), it must appear that it was in fact intended to give a preference, and that the creditor had reasonable cause to believe that it was so intended; and mere suspicion or slight proof is not sufficient.

Appeal from the District Court of the United States for the Northern District of Georgia.

Victor Lamar Smith (Janes & Hutchens and Smith, Hammond & Smith, on the brief), for appellant. William P. Hill and J. L. Mayson, for appellee.

Digitized by Google

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

SHELBY, Circuit Judge. This is a suit by T. J. Bryan, as trustee in bankruptcy of A. B. Tumlin Company, a partnership composed of A. B. Tumlin and M. K. Pounds, against W. L. Tumlin, to recover $3,430, the amount of six payments made by the bankrupts within four months of bankruptcy. The first of the payments was made July 26, 1906, and an involuntary petition was filed against the firm October 5, 1906. The payments were made to discharge a debt of the firm, shown by its note and a chattel mortgage. The bill contained the usual averments seeking to recover the payments as voidable preferences under the bankruptcy act. The defendant answered, denying the material averments of the bill. There was an order of reference and a report in favor of the complainant. The defendant excepted to the report, and his exceptions were overruled by the District Court, and a decree entered in favor of the trustee for the aggregate amount of the payments and interest. The defendant, by exceptions to the report and by assignments of error here, contends that the report and decree are not sustained by evidence, because (1) it was not proved that at the time the payments were made the debtors were insolvent, and (2) that at the time the payments were made the defendant did not have reasonable cause to believe that the debtors intended thereby to give him a preference.

The burden of proof is on the complainant, and, unless he shows by sufficient evidence the elements of a voidable preference, he is not entitled to recover. He must prove that the bankrupts (1) while insolvent, (2) within four months of the bankruptcy, (3) made a transfer of their property, i. e., a payment of money, (4) and that the creditor receiving the payment was thereby enabled to obtain a greater percentage of his debt than other creditors of the same class; and it must also be proved (5) that the person receiving the payment, or to be benefited thereby, had reasonable cause to believe that it was thereby intended to give a preference. Bankr. Act, § 60, cls. "a" and "b" (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).

There is no denial that the payments alleged were made, and that they were made within four months of the bankruptcy.

The case turns on the contention of the defendant that there is no sufficient evidence to sustain the decree showing that the bankrupts were insolvent at the time the payments were made, and that the evidence does not show that the defendant had reasonable cause to believe that the payment was intended to give a preference. A person is deemed insolvent within the meaning of the act "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Bankruptcy Act, § 1a (15). The complainant, as a witness for himself, in answer to a question which assumed that he had "gone through the books and familiarized himself with the condition of the affairs of A. B. Tumlin Company," testified that "they were insolvent, in my opinion;" the answer referring to their condition on July 1, 1906, about the time the payments in question were made.

Digitized by Google

He was not asked what property the firm owned, nor its value, nor the amount of the firm's debts. The schedules filed by the bankrupt firm December 27, 1906, are relied on as showing insolvency of the firm in July, 1906. If from these schedules and the dates of accounts listed it be conceded that the firm's indebtedness in July, 1906, may be ascertained, and that other schedules show the property owned by the firm at the time of the bankruptcy, this is not sufficient. It is not shown what property was owned by the firm in July, 1906, at the date of the payments, nor is the value of the property then owned by it proved.

And, besides, we find no evidence showing what property was owned by the individual members of the bankrupt firm in July, 1906. In a claim for exemptions filed by the attorneys for the members of the firm there is a statement that they owned no property except the partnership property. The petition is sworn to October 23, 1906. If that affidavit is admissible against the defendant in this suit, it is insufficient to show the pecuniary condition of the members of the bankrupt firm in July, 1906. As each member of the partnership is liable individually for the partnership debts, it seems to follow that, to show such insolvency as to entitle the trustee to recover, the insolvency of the members of the firm should be proved. If a condition exists whereby all diligent creditors may obtain payment in full, it seems useless and unjust to sustain a suit against a defendant who has only collected what was due to him. It is true that a partnership may be treated as an entity, separate from its individual members, for the purpose of its adjudication as a bankrupt (Bankruptcy Act, § 5a; In re Meyer et al., 98 Fed. 976, 39 C. C. A. 368; In re Mercur, 122 Fed. 384, 58 C. C. A. 472); but, in a suit to recover a preference, it is not only the insolvency of an intangible entity, but the insolvency of its responsible component parts, that lies at the foundation of the right to relief. If the component parts of the firm may be made to pay the firm's debts, the suit lacks reason and substance, and it cannot be held that the defendant has obtained a greater percentage of his debt than other creditors of the same class. If the members of the firm are solvent, all creditors may be paid in full. If the individual members of the partnership are not shown to be insolvent at the date of the payments, the preference is not voidable. Vaccaro et al v. Security Bank of Memphis et al., 103 Fed. 436, 43 C. C. A. 279. See also In re Blair et al. (D. C.), 99 Fed. 76; Davis et al. v. Stevens et al. (D. C.), 104 Fed. 235; In re Forbes et al. (D. C.), 128 Fed. 137; In re Perley & Hays (D. C.), 138 Fed. 927.

To sustain the decree, it must appear that there was evidence to show that the defendant had reasonable cause to believe that it was intended by the payments in question to give a preference. Bankruptcy Act, § 60b. The reasonable implication of the statute, it has been held, is that the debtor himself must have intended the preference. In re First National Bank of Louisville, 155 Fed. 100, 84 C. C. A. 16; Hardy v. Gray et al., 144 Fed. 922, 75 C. C. A. 562. A careful reading of the evidence does not lead us to the conclusion that the defendant believed the firm to be insolvent. But a belief that a debtor is insolvent is a very different thing from the belief referred to by the statute — "reasonable cause to believe that it was intended" by the payments to give a preference. It may often happen that one, though in fact insolvent, will continue his business and make payments in

Digitized by Google

the usual way, without a thought of preferring one creditor to another, and with the hope and belief that he would finally be able to pay all. If these payments were made by the firm, without the thought of injuring other creditors, and in the belief that it would be able to pay them all, the defendant cannot be charged with reasonable cause to believe that a preference was intended. When a debtor pays, and a creditor receives, the amount of a just debt, the natural presumptions are in favor of the good faith of the transaction. To let the mere fact of the bankruptcy of the debtor within four months make the transaction involved voidable would be to create uncertainty and uneasiness as to the probable result of every settlement between debtor and creditor. Reasonable cause to believe that a preference was intended cannot be held to be proved by circumstances that would merely excite suspicion. And circumstances may seem suspicious after the bankruptcy occurs that would not appear unusual at the time of their occurrence, and would then have presented no "reasonable cause" on which to found a belief of intended preference. Merchants and other business men constantly continue to make payments up to the very eve of failure, and it would be disastrous to have them set aside on slight proof or mere suspicion. Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640.

The fact that one of the payments was made in notes payable to and indorsed by the firm was fully explained. The defendant was satisfied to receive the notes bearing interest, for he would have placed the money at interest if he had been paid in cash.

We are of opinion that the evidence does not sustain the decree.

The decree of the District Court is reversed, and the cause remanded, with directions to dismiss the bill.

Decision No 1142

ALABAMA GROCERY CO. v. FIRST NATIONAL BANK OF ENSLEY.

(Supreme Court of Alabama. June 30, 1908. Rehearing denied January 14, 1909.)

48 So. 340.

PLEADING — REPLICATION — DEPARTURE — BILLS AND NOTES — "BONA FIDE HOLDER" — BANKS.

1. Where plaintiff declared on bill of exchange as payee, replications alleging that plaintiff purchased the bill after its acceptance were demurrable as a departure.

2. A bank, which discounts paper for a depositor and gives him credit for the proceeds, is not a "bona fide holder" for value, so as to be protected against infirmities in the paper unless some other consideration passes, such transaction merely creating the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not withdrawn the bank is subject to the equities of the prior parties, though the paper is taken before maturity and without notice.

Digitized by Google

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action by the First National Bank of Ensley against the Alabama Grocery Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Cooper & Foster, for appellant. Brickell & Smith, for appellee.

HARALSON, J. Action on bill of exchange drawn by Steel City Produce Company on Alabama Grocery Company, payable to First National Bank of Ensley (plaintiff) and accepted by Alabama Grocery Company (defendant).

The defendant in the court below (appellant here) filed three special pleas, numbered 2, 3 and 4, setting up that it was a corporation, that the acceptance of the bill by it was for the accommodation of the drawer, and that such acceptance was ultra vires; and, further, that there was no consideration for the acceptance. To these special pleas, the plaintiff (the bank), in addition to the general replication, filed two special replications, setting up that it purchased the bill of exchange for value to the drawer, without notice that the acceptance was for the accommodation of the drawer. Demurrers were interposed to these special replications on the ground of departure, and overruled. In this the court was in error.

The plaintiff in its complaint declared on the bill of exchange as payee of one of the parties thereto. It was not good pleading to set up in the replication that it purchased the same after acceptance. The pleader probably intended to claim that plaintiff was a bona fide holder for value without notice.

The bill of exceptions purports to set out all of the evidence, and the court gave the general affirmative charge for the plaintiff, evidently on the theory that plaintiff proved his special replications. One of the material allegations of the replications was, that plaintiff paid value to the drawer. The only evidence on this point was that of the witness Du Bose, the president of the plaintiff, who testified that "being notified by the Bank of Huntsville that said bill of exchange had been accepted by the defendant, he, for the plaintiff, gave credit for the amount of the same to said Steel City Produce Company, who kept a regular account at plaintiff bank; . . . that he either paid the cash to the said drawer or placed the amount of said bill to the credit of the drawer. His best recollection was that he placed it to the credit of the drawer, subject to be checked out." For all that appears, the money may have been in plaintiff's bank at the time of the trial.

Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of said paper, it is not a bona fide holder for value, so as to be protected against infirmities in the paper, unless in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues, and the deposit is not drawn out, the bank is held subject to the equities of the prior parties, even though the paper has been taken before maturity and without notice. Central National Bank v. Valentine, 18 Hun (N. Y.) 417; Manufacturers' National Bank v. Newell, 71 Wis. 309, 37 N. W. 420;

Digitized by Google

Bank v. Huver, 114 Pa. 216, 6 Atl. 141; Dougherty v. Central National Bank, 93 Pa. 227, 39 Am. Rep. 750; Dresser v. Missouri, etc., Co., 93 U. S. 92, 23 L. Ed. 815; First National Bank v. Nelson, 105 Ala. 180, 16 So. 707.

The court erred in giving the affirmative charge for the plaintiff, and under the pleadings and evidence should have given the affirmative charge for the defendant. Noble v. Walker, 32 Ala. 459.

Reversed and remanded.

DOWDELL, DENSON and McCLELLAND, JJ., concur.

Decision No. 1143.

MARLING v. JONES et al.

(Supreme Court of Wisconsin. February 16, 1909.)

119 N. W. 931.

BILLS AND NOTES — ACCOMMODATION PAPER — CONSIDERATION — KNOWLEDGE OF HOLDER — NEGOTIABLE INSTRUMENTS LAW — ACCOMMODATION NOTE — DISCHARGE — TRANSFER AFTER MATURITY — MORTGAGES — PAYMENT — NOTICE — ASSIGNMENTS — RECORD.

1. No consideration moving to an accommodation maker of a note is necessary to uphold it; the consideration supporting the promise of the maker being that parted with by the person taking the accommodation note and received by the person accommodated.

2. It is no defense to the maker of an accommodation note that the holder other than the person accommodated, whether indorsee or transferee for value, knew before or when he took the note that the accommodation maker received no consideration therefor.

3. Negotiable Instruments Law (Sanborn's St. Supp. 1906, § 1676–28), providing that in the hands of a holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable, applies to an accommodation note transferred after maturity.

4. Under Negotiable Instruments Law (Sanborn's St. Supp. 1906, § 1679–2), providing for the payment of negotiable instruments, an accommodation note is discharged by a payment in due course by the party accommodated.

5. The agency of a party accommodated to use accommodation paper to raise money thereon does not expire with the maturity of the paper; and hence the fact that an accommodation note was transferred by the accommodated party after maturity to a holder for value does not authorize the maker to defeat a recovery in a suit by such holder, on the ground that the note was accommodation paper.

6. Where a deed to real estate, mortgaged to secure an accommodation note, was delivered to the grantee simultaneously with the satisfaction of the mortgage, and as a part of the transaction the mortgage was excepted from the covenant in the deed against incumbrances, the grantee was not thereby placed in the position of a debtor paying the mortgage debt, and was only charged with notice of the existence of the mortgage and the name of the mortgagee from whom the satisfaction was obtained.

Digitized by Google

7. Where a grantee of mortgaged premises accepted a deed excepting the mortgage from the covenant against incumbrances, and as a part of the same transaction received a satisfaction from the record holder of the mortgage, which had been assigned, without recording the assignment, the grantee was not bound to insist on the production of the note and mortgage, but was a purchaser in good faith, and without knowledge of the outstanding assignment; and, having placed his deed and satisfaction on record before the assignment was recorded, the assignee was estopped to enforce his mortgage lien.

8. The indorsee of a negotiable note secured by a mortgage on land may safely hold possession of the mortgage and note without recording his assignment, and will be protected against payments by the debtor to the original mortgagee.

Appeal from Circuit Court, Milwaukee County; J. C. Ludwig, Judge.

Action by Celia Ellis Marling against Everett H. Jones and another to foreclose a mortgage. From a judgment dismissing the complaint, plaintiff appeals. Modified and affirmed.

Among other references upon the part of the appellant were the following: Cooper v. Jackson, 4 Wis. 537; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Wiltsie, Mortgage Foreclosure, § 395; Reichert v. Neuser, 93 Wis. 513, 67 N. W. 939; Cleveland v. Southart et al., 25 Wis. 479; 3 Pom. Eq. Jur., § 1205; Winkelman v. Brickert, 102 Wis. 50, 78 N. W. 164; Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423; Marling v. Nommensen, 127 Wis. 363, 106 N. W. 844, 5 L R. A. (N. S.) 412, 115 Am. St. Rep. 1017; Nix v. Wiswell, 84 Wis. 334, 54 N. W. 620.

Among other references upon the part of the respondents were the following: Section 2241, St. 1898; 1 Am. & Eng. Encyc. of Law (2d ed) p. 364; Hodge v. Wallace, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938; sections 1676–22, 1675–54, Sanborn's St. Supp. 1906; Butler v. Bank of Mazeppa, 94 Wis. 351, 68 N. W. 998; Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33; Kellogg v. Fancher, 23 Wis. 21, 99 Am. Dec. 96; Grand Rapids Bank v. Ford, 143 Mich. 402, 107 N. W. 76, 114 Am. St. Rep. 668; Bautz v. Adams, 131 Wis. 152, 111 N. W. 69, 120 Am. St. Rep. 1030; Bennett v. Keehn, 67 Wis. 154, 29 N. W. 207, 30 N. W. 112; Remington v. Dental, etc., Co., 101 Wis. 307, 77 N. W. 178; Jones on Mortgages, § 859; Croft v. Bunster, 9 Wis. 503.

Goff, Hayes & Hannan, for appellant. Charles E. Estabrook and M. H. Brand (Frank T. Boesel, of counsel), for respondents.

TIMLIN, J. The findings establish that on September 21, 1898, Everett H. Jones executed his promissory note for $2,000, payable two years after date to the order of Henry Herman, and bearing interest, and at the same time, and as security for the payment of the note, executed a mortgage to Henry Herman in due form, upon lots 11, 12, 13, 14, 15, 16, 17, 18 and 19 in block No. 1, Lindsay's subdivision in the seventeenth ward of the city of Milwaukee, which mortgage was recorded on September 22, 1898, in the proper office. Jones executed and delivered this note and mortgage to Herman, with the understanding that Herman would negotiate the same and raise money thereon, but Jones received no consideration, and the note and mortgage were executed by him merely for the accommodation of Henry Herman. June 2, 1901, Jones conveyed the mortgaged premises sub-

Digitized by Google

ject to this mortgage of $2,000 to one Raymond, the confidential agent for Henry Herman, who was acting for the latter in all the transactions herein mentioned. This deed was recorded February 11, 1902, in the proper office. Jones never had, or claimed, any real interest in or to the mortgaged property. April 2, 1902, Henry Herman assigned to the plaintiff's assignor, under whom she claims, and after it was past due, the note and mortgage aforesaid, and indorsed the note, and delivered the instruments so assigned and indorsed to plaintiff's assignor as collateral security to a promissory note of $2,000 then executed for value by Henry Herman to plaintiff's assignor, and bearing even date with said assignment. This assignment was not recorded until April 16, 1903. October 16, 1902, Henry Herman delivered to the defendant Lindsay a warranty deed of the mortgaged premises running from Raymond to Lindsay, containing the statement in the covenant against incumbrances that the mortgaged premises were free and clear of all incumbrances whatever, except one mortgage for the sum of $2,000. This deed was dated and acknowledged February 28, 1902, and recorded in the proper office October 17, 1902. On October 16, 1902, at the time of the delivery of the deed to Lindsay, Herman also delivered to Lindsay a satisfaction piece or release in writing of the mortgage first mentioned, which release is dated October 16, 1902, and was recorded October 17, 1902, in the proper office. The consideration of this conveyance of land and satisfaction of mortgage to the defendant Lindsay was that Lindsay credited Henry Herman with a payment of $2,475 on a note of $4,500 dated November 27, 1900, belonging to Lindsay, upon which Herman was liable as indorser. Lindsay took possession of the premises in question immediately after the transfer, and paid the taxes thereon since said date. The transaction between Herman and Lindsay was at one and the same time a purchase of the lots from Herman by Lindsay for $2,475 and a payment of the mortgage of $2,000 thereon by Lindsay; both incidents being part of the same transaction. Lindsay had no knowledge or information of any kind of any claim by the plaintiff's assignor to the premises. He acted in good faith, and relied upon the record title to the premises with respect to the title as well as to the mortgage; but he did not require the production of the note and mortgage in queston, and the same were not produced. There is due and owing to the plaintiff upon the note in question $2,575, and, except as hereinbefore stated, no part has ever been paid. In addition to these findings of fact the undisputed evidence showed that the lots in question were, at the instance and request of Herman, conveyed by the National Realty Company to Jones immediately prior to the execution of the note and mortgage in question by Jones, and for the purpose of having Jones execute the mortgage thereon as an accommodation to Herman.

As conclusions of law from the foregoing facts the court below found that the note and mortgage executed by the defendant Jones are void for want of consideration, but that the defendant Lindsay is estopped to set up this invalidity because Lindsay purchased the mortgaged premises subject to the mortgage; that the plaintiff's assignor and the defendant Lindsay were negligent in their dealings with Henry Herman in the matters herein involved — plaintiff assignor in not recording his assignment after the same was delivered to him, and Lindsay in not demanding the note and mortgage in ques-

Digitized by Google

tion at the time the release of the mortgage and warranty deed to the lots were delivered to him — that the plaintiff cannot come into equity asking relief because his negligence was prior to, and greater than, that of the defendant Lindsay; that the defendants, Jones and Lindsay, are entitled to judgment dismissing the plaintiff's complaint with costs. The reasons given in the foregoing conclusions of law do not meet the approval of this court, but we review results, not reasons assigned.

Was the action properly dismissed as to Jones? No consideration moving to the accommodation maker is necessary to uphold an accommodation note. The very name of the paper suggests this. The consideration in such case which supports the promise of the accommodation maker is that parted with by the person taking the accommodation note and received by the person accommodated. Nor is it any defense by the maker of an accommodation note that the taker other than the person accommodated, whether indorsee or transferree for value, knew before and when he took the note that the accommodation maker received no consideration. This would be merely showing that such taker, indorsee, or transferee knew that it was an accommodation note. If this were sufficient to defeat the note, there could be no such thing as accommodation paper, except in cases of ignorance of this fact on the part of the taker, indorsee, or transferee, and this would be contrary to common experience, and avoid many of the daily transactions in banking and other branches of business. Sections 1675–55, vol. 3, Sanborn's Supp. 1906 to St. 1898. But the accommodation note in question was transferred by the party accommodated, namely, the payee therein, after it became due. Does this circumstance permit the accommodation maker to avoid the note on the ground that he received no consideration? If the effect of a transfer, after due, is merely to leave the transferee subject to notice or knowledge of the true circumstances attending the excution of the note in question, and for this reason subject him to defenses, then, as actual knowledge that the note was accommodation paper would be no defense by the accommodation maker as against the transferee for value from the party accommodated, it would seem that it could make no difference in the liability of the accommodation maker upon this ground whether the note was transferred before or after due. Aside from this imputed notice or knowledge, or actual notice or knowledge, it is not true that the taker for value from the party accommodated stands in the shoes of the latter. The difference between them is that one has parted with value for the note and the other has not. In neither case has the maker received a consideration moving to him. So that between the party accommodated and the accommodation maker there is no consideration parted with or received by either, while between the transferee for value and the accommodation maker there is a consideration moving from the former at the instance of the latter sufficient to support the contract. There is considerable conflict among the decisions on this point, and those text-writers who profess to have made a thorough examination of the cases seem to incline to the belief that the weight of authority upholds the view that the transferee of accommodation paper after due may enforce the same against the accommodation maker. Joyce on Defenses to Commercial Paper, § 282 (A. D. 1907); 1 Dan. Neg. Instruments (5th ed.), § 726 (A. D. 1903); 2 Randolph. Comm. Paper (2d ed.), § 677

Digitized by Google

(A. D. 1899); Story, Prom. Note (7th ed.), § 194 (A. D. 1878); 2 Parsons, Notes & Bills, p. 29 (A. D. 1865); Mersick v. Aderman, 77 Conn. 634, 60 Atl. 109; Black v. Tarbell, 89 Wis. 390, 61 N. W. 1106; 1 Am. & Eng. Encyc. of Law, 364.

The uniform Negotiable Instruments Law (Sanborn's St. Supp. 1906, §§ 1675–1684–7) enacted by the legislature of this State, and in like manner adopted by thirty-four States of the Union, and by Congress for the District of Columbia, in the effort to bring about more uniformity of decision regarding these instruments of commerce, appears to distinguish between a holder for value and a holder in due course. Brannan on the Negotiable Instruments Law (A. D. 1908); Bunker on the Negotiable Instruments Law (A. D. 1905). Section 1675–55, Sanborn's St. Supp. 1906 to St. 1898, defines who is an accommodation party, and provides that such party is liable on an instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. Section 1675, Sanborn's St. Supp. 1906, defines "holder" to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, and defines "value" to mean a valuable consideration. On the other hand, a holder in due course is defined in section 1676–22, Sanborn's St. Supp. 1906, to be one who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; (5) that he took it in the usual course of business.

In the hands of a holder otherwise than in due course such note is subject to the same defenses as if the notes were not negotiable. Section 1676–28, Sanborn's St. Supp. 1906. A negotiable instrument is discharged by the payment in due course by the party accommodated. It is not discharged by payment by a party secondarily liable thereon, but remits such party to his rights against him primarily liable (section 1679–2, Sanborn's St. Supp. 1906), except where it is made for accommodation and paid by the party accommodated. Id. On the other hand, there are the cases of Chester v. Dorr, 41 N. Y. 279; Peale v. Addicks, 174 Pa. 543, 34 Atl. 203; Bacon v. Harris, 15 R. I. 599, 10 Atl. 647; Battle v. Weems, 44 Ala. 105, and Simons v. Morris, 53 Mich. 155, 18 N. W. 625. See, however, in Alabama the later case of Connerly v. Planters' & Mer. Ins. Co., 66 Ala. 432; in Michigan the later case of Warder et al. v. Gibbs, 92 Mich. 29, 52 N. W. 73.

No doubt there exists a class of defenses in favor of the accommodation maker of negotiable paper which may not be urged in cases where the note is fair on its face and negotiated in due course before due to a purchaser for value, without notice or knowledge of any infirmity, but which might be urged in favor of the accommodation maker if the note were overdue when negotiated, but the fact that the accommodation maker received no consideration is not one of these defenses, so long as the note was negotiated by his express or implied authority. The fact is here established that this note was in its inception accommodation paper. Jones made to Herman no express restriction upon its use for that purpose. We do not overlook the testimony of Brand

Digitized by Google

with reference to conversations between him and Herman not in behalf of Jones, which the court below from its findings must have rejected as incredible. We approve this rejection. The testimony is overborne by the circumstantial evidence. It is a question upon which the precedents are at some variance whether or not the agency of the party accommodated to use the accommodation paper to raise money thereon (no express agreement appearing) expires with the maturity of the paper. The greater number of courts seem to favor the view that the agency to negotiate an accommodation paper and raise money thereon is not so limited. See citations, supra. The courts of this State are not yet committed upon the question presented, and it seems more in harmony with the uniform Negotiable Instruments Law, and with the weight of judicial authority, to hold, as we do, that the mere fact that the accommodation note was transferred by the party accommodated after due to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note, and without consideration moving to the accommodation maker. This necessitates a modification of the judgment of the court below so as to permit the appellant to take judgment against the accommodation maker, Jones.

Upon the question of the right of the appellant to foreclose the mortgage against the mortgaged premises different questions arise. The findings of the court below, based on sufficient evidence, establish that the transaction between Lindsay and Herman which resulted in Lindsay receiving from Raymond, at Herman's request a warranty deed of the mortgaged premises, with covenant against incumbrances except the mortgage in question, and in receiving from Herman a satisfaction of the mortgage in question, was a single transaction at one and the same time, a purchase of the lots by Herman from Lindsay, and a pyament of the mortgage of $2,000 thereon, in consideration of $2,475 of pre-existing debt then and there, and by that transaction, paid and discharged. Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33. Within the rule of Marling v. Nommensen, 127 Wis. 363, 106 N. W. 844, 5 L. R. A. (N. S.) 412, 115 Am. St. Rep. 1017; Friend v. Yahr, 126 Wis. 291, 104 N. W. 997, 1 L. R. A. (N. S.) 891, 110 Am. St. Rep. 294, and other cases, Lindsay was a purchaser of the real property. The fact that the deed, delivered to him simultaneously with the satisfaction of mortgage, and as part of the transaction, excepted this mortgage from the covenant against incumbrances was not sufficient to put Lindsay in the position of a debtor paying a mortgage debt. It, with the abstract, merely charged him with notice of the existence of the mortgage and the name of the mortgagee from whom he procured the satisfaction piece. His rights must be determined by the rule of the cases last cited, rather than by the rule of Bartel v. Brown, 104 Wis. 493, 80 N. W. 801. He is entitled to the protection which the statute gives to purchasers without notice, because it is found that he purchased in good faith for a valuable consideration, without knowledge of the outstanding assignment of the mortgage to plaintiff's assignor, and first placed his deed and satisfaction of mortgage upon record, and as against such purchaser the assignee of the mortgage who fails to record his assignment is estopped to assert his mortgage lien. Friend v. Yahr, supra. It is not a question of comparative negligence between plaintiff's assignor and Lindsay. The

Digitized by Google

indorsee of a negotiable note and mortgage may safely hold possession of that mortgage and note without recording his assignment, and, nothing else appearing, he will be protected against payments by the debtor to the original mortgagee who has not possession of the note and mortgage. But it is otherwise as against a purchaser of land who purchases in good faith and for a valuable consideration, without notice of the assignment, and who receives, at the time of his purchase, and as part of the same transaction, a conveyance of the land and a satisfaction of the mortgage by the apprent owner of record from or through the vendor. Marling v. Nommensen, supra. We are not then merely dealing with the rights of debtors and holders of negotiable paper, but with those of purchasers of real estate.

The judgment of the Circuit Court is ordered modified so as to provide for judgment in favor of the plaintiff and against the defendant Jones for the amount found due the plaintiff, but not exceeding the amount due from Jones upon the note executed by him to Herman, costs in the discretion of the court below, and the judgment is in other respects affirmed; costs of this court in favor of appellant against both respondents.

WINSLOW, C. J., took no part.

Decision No. 1144.

FEIGENSPAN v. McDONALD.

(Supreme Judicial Court of Massachusetts. Suffolk. March 1, 1909.)

87 N. E. 624.

PARTIES — NONJOINDER OF PARTIES — MODE OF OBJECTION — BILLS AND NOTES — NOTICE OF DISHONOR — PROOF — NOTARIAL CERTIFICATE — BANKRUPTCY — EFFECT ON PENDING SUIT — BONA FIDE PURCHASERS — NOTICE — PARTNERSHIP — MUTUAL RIGHTS AND LIABILITIES — POWER TO BORROW MONEY AND ISSUE NOTE — RIGHTS AND LIABILITIES AS TO THIRD PERSONS — POWER TO ISSUE NOTE — ACTIONS — PRESUMPTIONS AND BURDEN OF PROOF — BAD FAITH — RATIFICATION — COLLATERAL AGREEMENTS — APPEAL AND ERROR — FAILURE TO ARGUE POINTS — EFFECT — TRIAL — REQUESTED INSTRUCTION — REQUESTS NOT SUPPORTED BY EVIDENCE — REQUESTED INSTRUCTION COVERED BY INSTRUCTIONS GIVEN.

1. In an action on an indorsement of a note, the nonjoinder of defendant's copromisor can be taken advantage of only by an answer in abatement, and is not available as a defense at the trial on the merits.

2. Under Rev. Laws 1902, c. 73, § 13, providing that the protest of a note shall be prima facie evidence of protest and notice; section 116, providing that notice to a partner is notice to the firm, though there has been a dissolution; section 122, providing that, where notice is addressed and deposited in the post office, the sender is deemed to have given due notice; and section 123, providing that notice is deemed to have been deposited in the post office when deposited in any branch office or in any letter box — a notarial certificate, to control which no evidence was offered, fur-

Digitized by Google

nished sufficient proof of the maker's failure to pay the note at maturity, and of notice of dishonor to a partnership indorser, even if the partnership had been dissolved, and defendant partner not informed by his former partner of the protest.

3. Under Bankr. Act July 1, 1908, c. 541, § 11, 30 Stat. 549 (U. S. Comp. Stat. 1901, p. 3426), providing that a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of filing a petition against him, shall be stayed until after an adjudication or dismissal of the petition, and, if such person is adjudged a bankrupt, such action may be further stayed until one year after the adjudication, or until the question of such discharge is determined, while a court in which a suit on contract is pending against a bankrupt may, after adjudication, stay further proceedings pending the obtaining of a discharge, it is not required to do so, but can proceed to judgment.

4. A member of a commercial partnership executed a note in his own name, payable to his order, and issued the same, with his indorsement, followed by the indorsement of the partnership. Held, that the tenor of the note and order of indorsements raised no conclusive presumption that the indorsement of the partnership was for the accommodation of the partner, or that upon negotiation he received the money for his private use.

.5. A member of a commercial partnership may borrow money for the use of the parnership, and issue its note, without knowledge of his associates, who will be bound.

6. Private limitations upon the authority of a member of a commercial partnership to borrow money for the use of the partnership and issue its note cannot affect a holder who takes the note without knowledge of them.

7. Where, if there was substantial evidence that the proceeds of a note had been used by a partner for his private benefit, and that he negotiated the note for that purpose, using the firm's indorsement to obtain credit, the holder placed its right of recovery on two grounds, either that it took the note without notice of the defect, or that defendant partner, with knowledge of his co-partner's use of the money, had ratified his act, both questions were issues of fact, upon which the holder had the burden of proof.

8. Under Rev. Laws 1902, c. 73, § 73, providing that to constitute notice there must have been actual knowledge of the infirmity or defect in a negotiable instrument, or knowledge of such facts that the taking the instrument amounted to bad faith, a holder who acted in good faith, without notice of any infirmity, is a holder in due course.

9. Where a partner, with knowledge that his co-partner had negotiated a note, with the partnership's indorsement, for his personal benefit, assumed and engaged to pay the note in the agreement for settlement of the affairs of the partnership, and, having subsequently gone into bankruptcy, included the note in the schedule of creditors, to which he made oath that it was an indebtedness due the holder, a finding was warranted that he recognized the note as an outstanding obligation of the partnership.

10. An agreement by a partner with his co-partner to pay a note, negotiated with the firm's indorsement, because, unknown to his co-partner, he had received commissions for which he had failed to account, is not binding on the holder of the note; he being a stranger to such agreement.

11. An exception to the admission of evidence, not having been argued, must be treated as waived.

12. A request to rule is properly refused, where there is no evidence to which it is applicable.

13. Where the questions raised by requests for rulings were fully covered by instructions to which no exceptions were taken, the requests were properly refused.

Digitized by Google

Exceptions from Superior Court, Suffolk County.

Action by Christian Feigenspan against Patrick A. McDonald. Verdict for plantiff, and defendant excepts. Exceptions overruled.

John H. Blanchard, Samuel O. Reinstein, and M. M. Harris, for plaintiff. H. N. Allin, for defendant.

BRALEY, J. The nonjoinder of the defendant's co-promisor could be taken advantage of only by an answer in abatement, and was not available as a defense at the trial on the merits. Wilson v. Nevers, 20 Pick. 20, 22; Leonard v. Speidel, 104 Mass. 356, 359. If the plaintiff proved that he was a holder in due course, and that notice of non-payment had been given to the indorser, Charles S. Gove & Co., then under the answer, upon proof of their indorsement as a firm, he was entitled to recover the face of the note with interest. Rev. Laws, c. 73, §§ 33, 132, cl. 2. The notarial certificate, to control which no evidence was offered, furnished sufficient proof of the maker's failure to pay the note at maturity, and of notice of dishonor to the company, even if the partnership had been dissolved, and the defendant was not informed by his former partner of the protest. Rev. Laws, c. 73, §§ 13, 116, 122, 123. Nor is the defendant's bankruptcy a defense. While a court in which a suit in contract is pending against a bankrupt may after adjudication stay further proceedings pending the obtaining of a discharge, it is not required to do so, but can proceed to judgment. Bankruptcy Act, July 1, 1898, c. 541, § 11, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426); Rosenthal v. Nove, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512.

But, while these defenses are ineffectual, the defendant urgently contends that the delivery of the note was unauthorized, and the plaintiff took with notice of the infirmity. The partnership was engaged in the business of bottlers and wholesale dealers in liquors. It was composed of the defendant and one Flynn, by whom the note was made and issued with the indorsement of the firm name. But the tenor of the note and the order of the indorsements raise no conclusive presumption that the indorsement in the name of the firm was for the accommodation of the maker, or that upon negotiation he received the money for his private use. Wait v. Thayer, 118 Mass. 473. Unless there are restrictions limiting his authority, one member of a commercial firm may borrow money for use in their business, and issue in payment the promissory note of the partnership, without knowledge of his associates, who will be bound by his action. Reed v. Bacon, 175 Mass. 407, 56 N. E. 716. But even where there are such private limitations they cannot affect a holder who takes the note without knowledge of them. Stimson v. Whitney, 130 Mass. 591, 594, 595. If there was substantial evidence that the proceeds of the note had been used by Flynn for his private benefit, and that he hired the money for this purpose, using the firm's indorsement to obtain credit, the plaintiff put its right of recovery on two grounds, either that it took the note without knowledge of a defect in the title, or of circumstances which should have put it upon inquiry, or that the defendant with knowledge of Flynn's use of the money had ratified his partner's act. Both questions were issues of fact upon which the plaintiff had the burden of proof. Fillebrown v. Hayward, 190

Digitized by Google

Mass. 472, 77 N. E. 45; Munroe v. Cooper, 5 Pick. 412. In the statements made by Flynn, and the plaintiff's agent, who were witnesses at the trial as to the negotiations which led to the making of the original note of which the note in suit was a renewal, there was evidence to be submitted to the jury that the plaintiff acted in good faith, and without notice of any infirmity. If they found these conditions, the plaintiff was a holder in due course. Rev. Laws, c. 73, § 73; Fillebrown v. Hayward, ubi supra; Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923.

There also was ample evidence of ratification. The defendant testified that he was first informed of the misappropriation after the firm books had been audited, and he had received the report. Yet with this knowledge he engaged specifically in the agreement for settlement of the affairs of the partnership to assume and pay the note, which is recited to have been negotiated solely for the personal benefit of Flynn. After having subsequently gone into bankruptcy he included this note in the schedule of creditors, to which he made oath, that it was an indebtedness due to the plaintiff. The jury would be warranted in finding from this evidence, which was properly admitted, that he recognized the note as an outstanding obligation of the firm. Flagg v. Upham, 10 Pick. 147, 149; Swan v. Stedman, 4 Metc. 548; Wheeler v. Rice, 8 Cush. 205, 208, 209; Knight v. Rothschild, 172 Mass. 547, 52 N. E. 1062; Bankr. Act July 1, 1898, c. 541, § 7, subsec. 8, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424).

The offer of the defendant to show that by an oral contract between them subsequent to the agreement of dissolution Flynn agreed to pay the plaintiff's note because unknown to the defendant he had received commissions for the sale of whiskey for which he had failed to account was rightly excluded. The plaintiff was a stranger to the contract, and could not be affected by it.

An exception to the admission in evidence of the statement of condition referred to in the agreement for dissolution, not having been argued, must be treated as waived.

By the verdict in favor of the defendant on the second count the requests for rulings are confined to the first count. But of these the first, second and thirteenth should not have been given for reasons previously stated, and there was no evidence to which the sixth was applicable. The third was given, and the questions which in one form or another were raised by the remaining requests were fully covered by the instructions to which no exceptions were taken. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

Exceptions overruled.

Digitized by Google

Decision No 1145.

REPUBLIC LIFE INS. CO. v. HUDSON TRUST CO.

(Supreme Court, Appellate Division, First Department. March 5, 1909.)

115 N. Y. Supp. 503.

BANKS AND BANKING — CONDITIONAL DEPOSITS — TRANSFER — ESTOPPEL — TRANSFEREES — RIGHTS — PRESUMPTIONS — KNOWLEDGE OF LEGAL RIGHTS — JURY QUESTIONS — ACTION TO RECOVER — BURDEN OF PROOF — RIGHTS OF DEPOSITOR.

1. T. deposited money to S. Company's credit in defendant bank conditionally. Though the condition never arose, the company drew a check for the amount in favor of plaintiff corporation, and a bank officer who did not know of the condition credited plaintiff with the amount in a passbook issued to it. Before any account was opened on the books, it was discovered that the deposit was not subject to check, and the S. Company was notified within twenty-four hours, the check was returned, and defendant refused to transfer the account. It does not appear that plaintiff was a bona fide purchaser of the deposit, or that its position was changed to its prejudice between the issuance of the passbook and the notice to the S. Company. Held, that defendant is not bound by the credit indicated by the passbook.

2. Plaintiff was charged with notice of the facts depriving the S. Company of the right to draw the check, since R., who as president of the S. Company was at least presumptively chargeable with knowledge of the condition attached to the deposit, acted for such company in drawing the check and for plaintiff, of which he was also president, in accepting the check.

3. Plaintiff is not an innocent purchaser of the deposit, and has no more right to recover the fund than the S. Company if it had actual or constructive knowledge that the company had no right to draw the check.

4. The S. Company is presumed to know that it could not draw on the deposit without a new agreement with T.

5. Under the evidence, held questions of fact whether defendant intended to and did accept the check unconditionally as cash, and whether the S. Company acted in bad faith in inducing defendant to permit it to check out the fund.

6. The burden was on plaintiff to show that it was an innocent purchaser of the deposit for value.

7. A bank with which money was deposited to the credit of a third party to be paid on a condition imposed for the depositor's benefit could not pay any part of it on the depositor's check until the condition was met.

Appeal from Trial Term, New York County.

Action by the Republc Life Insurance Company against the Hudson Trust Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Argued before PATTERSON, P. J., and McLAUGHLIN, LAUGHLIN, HOUGHTON, and SCOTT, JJ.

Victor E. Whitlock, for appellant. Isaac H. Levy, for respondent.

Digitized by Google

LAUGHLIN, J. This is an action to recover the sum of $5,000, the proceeds of a check drawn by one E. R. Thomas on his account with the defendant to the order of the Central Life Securities Company, and deposited with defendant to the credit of that company on the 10th day of December, 1906, pursuant to an agreement between Thomas, the securities company, and the defendant, by which it was not to be subject to the check of the securities company or to become its property until the happening of a certain event which has not transpired. Thomas was an officer of the defendant and the securities company had no other account with it and no other funds were deposited to its credit. On the 22d day of April, 1907, the securities company drew a check to the order of the plaintiff on the defendant for the amount of this fund. The check was signed for the securities company by Birch F. Rhodus, its president, and by its treasurer, and at the same time it was indorsed for the plaintiff by Rhodus, its president, to the order of defendant for the purpose of opening an account with defendant in the name of the plaintiff. Rhodus then inclosed the check with a letter to defendant, signed by him as president of the securities company, with which he also inclosed authorized signatures of the plaintiff for the purpose of opening the account, and stated that he had requested one Sutherland to call on defendant and open an account and deposit funds in the name of plaintiff. The letter closed with this statement:

"If your custom in crediting interest on daily balances is satisfactory, I have no doubt that the account of the Republic Life Insurance Company will be a very satisfactory one."

An officer of the defendant, who had no knowledge of the original transaction or of the fact that the fund on which the check was drawn was not subject to be checked out, received the check and inclosures on the 24th day of April, 1907, and Sutherland called on that day and made out a deposit slip for the amount of the check, whereupon the same officer of defendant made out a passbook in the name of the plaintiff, crediting it with the amount of the deposit, and delivered the same to Sutherland, who forwarded it to plaintiff. Before transferring the account from the securities company to plaintiff, or opening any account in the name of plaintiff on the books of defendant, it was discovered that this deposit was not subject to be checked out, and the account was not transferred, and no account was opened in the name of plaintiff. The day after the passbook was issued, the defendant wrote Rhodus, addressing him as president of the securities company, drawing attention to the fact that this fund constituted a conditional deposit, and inclosing a copy of the letter of the securities company delivered to defendant at the time the account was opened, which was addressed to defendant and signed in the name of the securities company by E. T. Rhodus, its vice-president. The body of the letter was as follows:

"Please pay over to our company five thousand dollars ($5,000), which we hereby deposit for that purpose upon notification from us that our subscriptions of the Central Life Securities Co. have reached the amount of five hundred thousand dollars ($500,000) and been paid in to that amount."

Rhodus wrote a reply to this letter under date of April 27, 1907, which he signed as president of both companies, and in which he presumes to explain the letter, a copy of which the defendant transmitted to him, as follows:

Digitized by Google

"We presume it must have been the idea of Mr. E. T. Rhodus in giving you such a letter, to obtain for this company the favorable influence and good will of your institution until such time as the Republic Life Insurance Company was ready to itself receive funds; but, now, in view of the fact that the funds are being turned over of the Republic Life Insurance Company, and in further view of the fact that it expects to transact considerable business with you, it should have the benefit of your favorable influence and good will from this time on."

It is manifest that this was no explanation for filing the letter with the defendant, and it is perfectly clear that the purpose was, as claimed by the defendant and as will be presently seen, to preclude the securities company from checking out this fund until the happening of the event specified in the letter. The defendant replied to this letter, again calling attention to the fact that the deposit was conditional, and that for that reason the account had not been transferred, and returning the check drawn against the account and upon which defendant had issued the passbook. There is no evidence that the defendant received any reply to this letter. On the 11th day of November thereafter Thomas elected to reclaim the fund upon the ground that the event upon which it was to become the property of the securities company had not transpired, and that a reasonable time for compliance with the conditions had elapsed, and at his request it was credited to his account tnd a countercharge was made against the securities company to balance its account. On the 21st day of the same month plaintiff drew a draft on defendant for the account indicated by the passbook delivered to it by defendant, which, on being forwarded for collection through the usual channels, was dishonored by defendant on the 23d day of November, 1907, on the ground that there were no funds on deposit with it to the credit of the plaintiff.

I am of opinion that the cases of Oddie v. Nat. City Bank, 45 N. Y. 735, 6 Am. Rep. 160, and Kirkham v. Bank of America, 165 N. Y. 132, 58 N. E. 753, 80 Am. St. Rep. 714, relied upon by respondent, are not controlling. In those cases the intention to give the credit and create the relation of debtor and creditor was regarded as clear. In the former case the check was credited to a customer in the usual course of business, and the customer relied upon it to his prejudice. As the check was upon itself, the bank could readily have ascertained whether or not the account upon which it was drawn was good and the account was in fact good after the presentation of the check and on the same day, and the bank carelessly paid out the money on other checks subsequently presented. The court decided that it was better to hold that the bank intended to credit the one cusomer and to hold the other liable as for an overdraft. The court concedes in the opinion that the rule would have been different had the check been drawn upon another bank and been deposited to the credit of the customer. The check in question was neither drawn nor deposited by a customer, nor in the ordinary course of business. It was drawn against a conditional deposit of a single item, and presented for deposit as the sole item upon which a new account was to be opened. It did not constitute an overdraft. The fund against which it was drawn was not yet available. The intention of the drawer, fully known to the payee, as shown by a statement made by Sutherland to one of the officers of the bank when he came there representing the

Digitized by Google

plaintiff and to open the account with the check, was to have his account consisting of this fund transferred to the credit of the plaintiff. An officer of defendant, ignorant of the fact that the deposit was conditional, was thus induced to issue the passbook. In these circumstances, it would be most inequitable to hold defendant estopped from declining to be bound by the credit indicated by the issuance of the passbook when within twenty-four hours, and, as soon as the error was discovered, it gave notice to the plaintiff by communicating with the president of the securities company, who represented it in attempting to thus open the account, and, on finding a disinclination to rectify the error, returned the check and refused to transfer the account on its books or to give plaintiff credit on its books. Here the defendant pleaded, and endeavored to prove, that the plaintiff received the check with knowledge of all material facts, tending to show that the securities company had no right to transfer the fund, and that with such knowledge, in thus inducing the defendant to accept the check and transfer the credit to plaintiff, it perpetrated a fraud on the defendant, on the discovery of which it elected too and did rescind the transcation and return the check, and there is no evidence that plaintiff was either a bona fide holder of the check or that its position had changed to its prejudice between the issuance of the passbook and the notice given by defendant that the account had not been transferred.

It is fairly to be inferred from the evidence that Thomas was induced to subscribe for capital stock in the securities company, and that he agreed to do so provided capital stock of the par value of $500,000 should be subscribed for and the subscriptions paid in cash. The promoters of the company evidently desired to use the name of Thomas to obtain other subscriptions, and to that end he delivered his check for $5,000 to E. T. Rhodus, who was the vice-president of the securities company, on the agreement, which was communicated to the treasurer of the defendant to whom the check was delivered by Rhodus and by or in his presence both orally and by letter of the securities company written Rhodus and delivered to the defendant by him, that it was given as a subscription for capital stock of the securities company, and was not to be paid over to the company until defendant received notice from it that subscriptions to the capital stock had been made and paid in cash to the amount of $500,000, and that, until such time, the deposit was not to be deemed to belong to the securities company or to be available to it, but was to remain the property of Thomas. The court received evidence of these facts, and, on motion of counsel for plaintiff, struck it out upon the theory that the evidence failed to show that plaintiff had notice or knowledge thereof. To this ruling counsel for defendant duly excepted. The courts excluded evidence of the conversation between Thomas and Rhodus at the time of the delivery of the check, which was offered for the purpose of showing that the delivery of the check was conditional, the same as subsequently stated to the defendant when the check was deposited to the credit of the securities company, and to this ruling an exception was likewise taken.

One question presented for decision is whether there was any evidence tending to show that plaintiff had notice or knowledge of the conditions upon which the account of the securities company with the defendant was opened, for it is quite clear that the conditions

Digitized by Google

upon which the account was opened were imposed for the benefit of Thomas, and that the defendant had no right, without his consent, to pay any part of the fund to the securities company until the conditions were complied with. The conditions were not complied with, and compliance therewith was not waived by Thomas. The securities company, therefore, could not have compelled the defendant to pay over the fund to it, and, if plaintiff had actual or constructive knowledge of the facts which deprived the securities company of any right to draw the check by which it attempted to transfer this fund to plaintiff, then plaintiff is not an innocent holder, and has no more right to recover than the securities company would have had. I am of opinion that the plaintiff was chargeable with notice and knowledge of these facts, and that such notice and knowledge were imputed to it by the fact that Rhodus, who was president of the securities company, and in that capacity presumptively, at least, chargeable with knowledge of the conditions upon which this money was placed to the credit of the company, acted for the securities company in drawing the check to the order of plaintiff, and at the same time was president of the plaintiff and acted for it in accepting the check and in opening the account in its name with defendant. The securities company was represented in the original transaction between it and Thomas and defendant by its vice-president, E. T. Rhodus, who was brother to the president of the companies and also vice-president of plaintiff. It is a reasonable inference that the records and papers of the securities company showed that this letter which was delivered to defendant when the account was opened had been written, and that the company had knowledge of the transactions with respect to this matter which rested in parol. Although there is no evidence that the president of the securities company had actual knowledge of the conditions upon which the account was opened, there is no evidence to the contrary. He was president of the securities company at that time, but did not become president of the plaintiff until the month of February thereafter. In this capacity as president in dealing with the affairs of the company in so far as they related to this account, he was chargeable with knowledge of the facts. He had, so far as the evidence shows, no personal interest either in having the check made by the securities company, or in having it received by the plaintiff or accepted by the defendant. It must therefore be presumed that he was acting solely in the interests of the respective companies of which he was president, and therefore the knowledge which he had in his capacity as president of the securities company was imputable to him in so far as he dealt with himself as agent of the plaintiff. Crooks v. People's Nat. Bank, 72 App. Div. 331, 76 N. Y. Supp. 92, 495.

There is another ground which I think is fatal to this judgment. The evidence presented questions of fact as to whether or not defendant intended to and did accept the check unconditionally as cash (see Scott v. Ocean Bank, 23 N. Y. 289, 291), and as to whether or not the securities company did not act in bad faith in inducing defendant to permit it to check out this fund. See Peterson v. Union Nat. Bank, 52 Pa. 206, 91 Am. Dec. 146, and Cragie v. Hadley, 99 N. Y. 133, 1 N. E. 537, 52 Am. Rep. 9. It must be presumed to have known that it had no right, without a new agreement to which the assent of Thomas was obtained, to draw on this

Digitized by Google

account. The course pursued was calculated to mislead the officers of the defendant. If the securities company had attempted to withdraw this large amount of money forming the sole item in the account, it is more likely that, before paying over the cash, it would have been discovered that the account was not subject to check; but merely transferring it on the books to another account, and that a new one apparently controlled by the same people was not apt to attract attention or arouse suspicion, and it did not. There is no evidence that plaintiff parted with value, or that its position has been changed to its prejudice by relying upon the acceptance of the check by defendant during the twenty-four hours before it received notice. The evidence points to a scheme on the part of the securities company to defraud Thomas and the defendant, on becoming alarmed about obtaining the necessary subscription to entitle it to this fund, and it may be that the relations of these companies are so intimate, since they had a common president and at least another officer in common, the securities company is using the plaintiff to accomplish this injustice. I am of opinion that a prima facie defense was shown, and that the plaintiff was called upon to give evidence that it was an innocent holder of the check for value.

It follows, therefore, that the judgment should be reversed and a new trial granted, with costs to the appellant to abide the event. All concur.

Decision No. 1146.

ELLIS v. STATE.

(Supreme Court of Wisconsin. March 9, 1909.)

119 N. E. 1110.

BANKS AND BANKING — INSOLVENCY — RECEIVING DEPOSITS — "DEPOSIT OF MONEY" — INDICTMENT — SUFFICIENCY — DEPOSIT IN DISCHARGE OF OVERDRAFT — WHAT CONSTITUTES — EVIDENCE — REPUTATION FOR FINANCIAL RESPONSIBILITY — RELEVANCY — VALUE OF COMMERCIAL PAPER — PRESUMPTIONS — RETROACTIVE — CIRCUMSTANTIAL EVIDENCE — APPEAL AND ERROR — REVIEW — QUESTIONS FOR TRIAL COURT — "UNSAFE OR INSOLVENT" — MEANING OF TERM DECLARED.

1. If a person deposits in a bank for his credit a check. and it is presently treated between such person and such bank as money, the former obtaining credit upon which he may, at his pleasure, draw for money, section 4541, Stat. 1898, is satisfied, as regards a deposit of money.

2. A charge in an indictment or information under such section, that a particular person deposited in a specified bank for his credit, a check on another bank and that it was received for the bank by its president, naming him, and accepted on deposit, satisfies all the essentials of such section as to an officer of a bank, in his capacity as such officer, accepting or receiving money on deposit.

3. In case of an officer of a bank accepting for such bank money of another to be and which is deposited for his credit to be at his pleasure drawn on, the status of such officer as regards section 4541 of the statutes of 1898 is thereby fixed regardless

Digitized by Google

of whether the depositor owes the bank on paper, due to and which does mature shortly so as to absorb the deposit, in part, before the bank is forced to suspend.

4. In case of a person depositing money in a bank as against an existing overdraft, so far as it goes in discharge of such indebtedness, it is not a deposit within the meaning of section 4541, Stat. 1898.

5. The call of the statute, as regards the act constituting a criminal fraud, is a deposit such as will creat a credit; the relation of debtor and creditor between the parties, or that of bailor and bailee or that of principal and agent.

6. Evidence of the reputation of a person as regards financial standing is relevant.

7. Evidence of the value of commercial paper based wholly on ignorance of the witness as to whether the maker possesses any property liable to execution, is not relevant, on the subject of the solvency of the maker.

8. "When the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question."

9. No presumption is raised in the manner aforesaid which is materially retroactive.

10. Proof of insolvency at a particular time does not create a presumption that the same condition existed at any considerable time anterior thereto, nor is it evidentiary of such condition at a time very remote to that which the evidence is directed.

11. Proof that a person was insolvent at a particular time by means of judgments against him shown at such time to be uncollectible, is circumstantial evidence that he was insolvent six months or more prior thereto, especially in case of his having shortly after the earlier date transferred his property for the purpose of securing payment of his obligations, is not relevant.

12. Within reasonable limits under reasonable circumstances proof of insolvency of a person at a particular date as circumstantially bearing on like insolvency at an earlier date, is relevant.

13. Whether evidence of the nature mentioned in the last foregoing is relevant or not, raises, primarily, a question of competency, in which field the decision of the trial court should not be disturbed on appeal unless clearly wrong.

14. In the situation suggested in the last foregoing, if the prior date under all the circumstances is too remote to permit of the circumstance of insolvency at the later date having reasonably any evidentiary significance, it is irrelevant.

15. In case officers of a bank are largely indebted thereto and possess property interests in a corporation to a very significant amount as compared to such indebtedness, and they convey such property to the bank on account of such indebtedness, pursuant to an understanding of long standing, the situation before the conveyance should be regarded substantially the same as that thereafter, as regards the mental state of such officers respecting the condition of the bank as to solvency.

16. In the situation in the last foregoing the fact that some of the officers, equally interested in the bank and the outside property mentioned, are not debtors of the bank but have, nevertheless, agreed with their associates to join in conveying such property to strengthen it as to paper on which they were not liable, creating a moral obligation, only, to so join, which obligation the other officers have good reason to suppose will be, and in fact is, redeemed, does not militate against the outside interest of such non-debtor officers being considered by the others, before the transfer, on the question of whether the bank is solvent.

17. The words "unsafe or insolvent" in section 4541, Stat. 1898, are used therein as legal equivalents.

18. The term "unsafe or insolvent" as used in section 4541, Stat. 1898, does not

Digitized by Google

mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business.

19. The term mentioned means insolvent in the broad general sense of a deficiency of one's assets in realizable cash available within a reasonable time, treated as an ordinarily prudent person would generally conduct his business under the same or similar circumstances, to pay his liabilities.

20. A bank is unsafe or insolvent within the meaning of the statute when the cash value of its assets, realizable in a reasonable time, in case of liquidation by its proprietors as ordinarily prudent persons would ordinarily close up their business, is not equal to its liabilities, exclusive of stock liabilities.

(Syllabus by the Judge.)

Error to Circuit Court, Eau Claire County; James O'Neill, Judge.

Jonathan S. Ellis was convicted of receiving a deposit with knowledge or good reason to know that the bank was unsafe or insolvent, contrary to St. 1898, § 4541, and he brings error. Reversed and remanded.

Writ of error to the Circuit Court for Eau Claire county to review a conviction for the offense of receiving money into a bank for the credit of a depositor with knowledge, or good reason to know, that the bank was unsafe or insolvent, contrary to section 4541, St. 1898.

The accused, during the time stated in the indictment, was president of the Security Savings Bank, a duly organized banking corporation under the laws of this State, located at Ashland, Wisconsin.

The indictment contained three counts, each for a violation of section 4541, aforesaid. The first was for receiving into the bank January 29, 1904, of A. L. Goodman, $125 in lawful money for his credit. The second was for so receiving February 2, 1904, a check for $1,000 of that value for credit of A. Donald. The third was for so receiving February 8, 1904, money and bank checks of the value of $59.65 from W. T. Briggs for his credit.

As to each alleged violation of law it was charged the accused received the deposit as president of the bank, knowing, or having good reason to know, that the bank was unsafe and insolvent.

The case was duly tried on a plea of not guilty. Questions discussed in the opinion were in due form saved for review.

The bank was duly incorporated September 10, 1903, as successor to a banking business previously conducted by a partnership composed of the accused, his brother E. H. Ellis, and his sisters, Danielia Loranger and Augusta Kennedy. Prior to such date the capital was $20,000 and business was dominated by the accused, he being supposed by the public to be substantially the sole owner. In the new organization the four persons named took the stock in equal proportions, except one share taken by Ellis Kennedy, son of Augusta Kennedy.

The stock was fixed at $50,000. The corporation started business with a duly approved paid-up capital of that amount. All assets of the private bank were turned over to the new organization and it assumed the liabilities. From the time of the new organization to the time it closed February 13, 1904, by reason of general disturbed financial conditions, some special local disturbances, and other causes, patrons of the bank withdrew credits to the extent of about one-third, the deposits being reduced from $162,560.97 to $107,000,

Digitized by Google

or thereabouts. Prior to the day named the proprietors partially arranged to borrow on assets of the bank $35,000, thinking that amount would tide over the difficulties, but before concluding to secure the money a consultation was had with the bank examiner, who, after an examination of the affairs of the bank, approved of its continuing, if, in the judgment of the proprietors, the $35,000 would so strengthen the reserves as to provide against a continuation of the reduction of deposits. Not feeling certain in that respect, the proprietors concluded to go into liquidation and the bank was closed accordingly, control of it being turned over to the bank examiner. At such time the amount of assets was $231,006.05, and liabilities other than to stockholders $108,270.46. The assets of the bank on February 3, 1904, and for a considerable period prior thereto, consisted of commercial paper around $75,000 in amount, which depended, for its value, in the main, upon responsibility of the accused, E. H. Ellis, and Ellis S. Kennedy, real estate mortgage security as to Kennedy's indebtedness and a moral obligation hereafter explained as to some indebtedness of George C. Loranger. Of this paper $6,300 was the obligation of George C. Loranger, on which the accused was liable as an indorser, $1,100 was paper of one Holbrook, son-in-law of the latter, and $12,500 of E. S. Kennedy, son of Augusta Kennedy. On such day the stockholders of the bank were proprietors of the stock of the Bay City Land Company in the same proportion as they were of the stock of the bank. Danielia Loranger, one of such stockholders, had verbally promised to convey her interest in the land company to the bank to care for the indebtedness of her husband to the bank and the indebtedness of Holbrook, and all the stockholders of such company understood from the organization of the bank that the company's property should be devoted to the interests of the bank. The value of the obligations of Mr. Loranger, the Ellises, and E. S. Kennedy on such day depended, in the main, except as to the real estate security mentioned, upon the responsibility of the stockholders in the land company and the moral obligations of Mrs. Loranger and Mrs. Kennedy to devote their interests in such company to those of the bank. Pursuant to such obligation the land company's assets, consisting of real estate of the assessed valuation of about $72,000, was conveyed to the bank. It had all such property at the later date when the bank was taken possession of by the bank examiner.

The evidence established all the matters aforesaid without dispute and further so established that the business of the bank was conducted without any refusal to pay any legitimate demand upon it up to the time it closed as aforesaid without supposing liquidation would be necessary, up to the time of the conference with the bank examiner aforesaid. There was further undisputed evidence that the value of the assets of the bank on the day of the closing and on and after February 3 and 4, 1904, was somewhere around $160,000, as the same was reasonably viewed at the time, and that such value existed on the 29th day of January, 1904, and thereafter up to and inclusive of February 2, 1904, contingent upon the responsibility of the stockholders of the land company being such, by reason of their ownership of the stock of such company, as to render the obligation to the bank substantially as good before the assets of the land company were turned over to the bank as before. The evidence

Digitized by Google

was further undisputed that, viewing the assets of the bank during the period from January 29, 1904, to and inclusive of February 13, 1904, exclusive of the land company's property and the obligation on account of which the same was turned over to the bank, were of the value of at least about $188,000, or enough to cover the liabilities into about $20,000, and that, taking the property of the land company at the value placed thereon by the witnesses, or taking the value of the paper, on account of which such property was turned over to the bank, at substantially equal to the value of such property as so placed, there was a surplus of assets over liabilities, at each of the times material under the information, of somewhere around $50,000.

There was no evidence indicating that, on either of such dates, the proprietors of the bank contemplated going into liquidation, or had any thought, other than that the bank would remain indefinitely in business. There was evidence that at the time the bank was examined by the bank examiner, just previous to his taking possession, he was of the opinion, there were assets sufficient to pay the liabilities, especially, except stock liabilities, and that he was of the opinion, when the bank closed, the proprietors did not believe but what there were assets sufficient to pay out, in money, all liabilities to depositors.

There was evidence to the effect that when the deposit was made, mentioned in the first count of the indictment, the same was placed to the credit of the depositor, who at that time owed the bank a considerable amount, but that none of it was then due. The evidence as to the deposit mentioned in the second count was to the effect that the deposit was treated as cash, the amount of the check called for being placed to the depositor's credit, and that the check was afterwards paid to the bank.

There was evidence to the effect that for a considerable time before the occurrence mentioned in the indictment, and up to the time the bank closed, the law was not complied with as to reserve; also evidence that some overdrafts were allowed, there being such at the time of the suspension to the amount of about $4,000, about $900 of which was against responsible persons other than the proprietors of the bank, and $1,700 only good, so far as the responsibility of the proprietors of the bank would make it so, either as owners of the property of the land company or as having turned such property over to the bank, leaving about $1,600 of overdrafts of no value.

There was other evidence as to want of good judgment in the conduct of the bank, and evidence that after the proprietors had turned all their money over thereto, as they did, nothing could be collected of them.

The cause was submitted to the jury, resulting in a verdict of guilty on the first and second counts and not guilty on the third. The various exceptions saved upon the trial will be mentioned in their order of importance in the opinion.

Sanborn, Lamoreux & Pray, for plaintiff in error. F. L. Gilbert, Attorney-General; V. T. Pierrelee, District Attorney, and M. Barry, Assistant District Attorney, for the State.

MARSHALL, J. (after stating the facts as above). In the foregoing statement we have avoided going into details or dealing much

Digitized by Google

with figures, except in the way of generalizations. There is such a mass of things in the record that any attempt to state it in detail would fail of accomplishing any valuable purpose and probably would leave the situation more or less involved in confusion.

The legal questions are few in number and will be presented in their logical order.

The fact that the deposit relied upon in the second count in the indictment was a check does not militate against its satisfying the call of section 4541, St. 1898, for a deposit of money. True, the check, as it went over the counter, was not money, but it was treated as such between the bank and its customer. It was taken as the equivalent of money at the face value. The money equivalent was placed to the credit of the depositor the same, in all respects, as if legal tender money had been passed over the counter. The relation of debtor and creditor, as between the bank and the depositor, with the characterization of liability on the one side and expectancy on the other as to payment on demand at any time within the banking hours, was created. In short, the transaction, in practical effect, was the same as if the bank had passed to its customer $1,000 for the check and he had immediately passed the same back for deposit and received credit therefor.

The foregoing, in the opinion of the court, is in harmony with — and really required by the rule of stare decisis on account of — State v. Shove, 96 Wis. 1, 70 N. W. 312, 37 L. R. A. 142, 65 Am. St. Rep. 17. We cannot appreciate that there is any difference between passing a certificate of deposit on a bank over its counter for credit or a renewal, the presumption being that money equivalent for such certificate is on hand to be passed out in exchange for the paper if desired, and passing over the counter a certificate of deposit or check or bill of exchange on another bank, which is taken as so much money in the ordinary course of business, the money itself being presumably present to be transmitted, if desired, in exchange for the paper. To say there is a difference in the two situations would, in my opinion, be trifling with the statute.

It is confessed that the indictment, in substance and practical effect, is the same as in State v. Shove, supra, but insisted that, as no point was made on the sufficiency of the charge in such case, the way is clear for a challenge in that regard now. Granted, for the purpose of the discussion. The following defects are now suggested: (a) It does not appear from the charge that the bank became the debtor of the depositor named in the first count; (b) it does not appear that the deposit consisted of money; (c) it does not appear that Ellis received the deposit for the bank.

The requisites of the statute as to (a) and (b), so far as is necessary to this case, is acceptance or reception on deposit of money tendered for that purpose by a customer. That is plainly charged in the first count, in the language of the statute, and is likewise so charged in the second, in the light of what we have said as to the reception of the check as money, being the same as if the thing passed over the counter had been money in fact.

(c) The claim that the indictment does not show that the accused acted, in receiving the deposits, for the bank, seems to be without merit. After charging receipt of money on deposit, in the one case and the check in the other, the language of the indictment, as to

Digitized by Google

each is, substantially, that the accused was, at the time of receiving the deposit, the president of the bank and the money was accepted and received into the bank on deposit. What more is needed? We cannot discover anything wanting.

The fact that the customer mentioned in the first count was indebted to the bank at the time he made his deposit, especially since the indebtedness was not presently due, does not militate against the receipt of the money satisfying the statute as to that element. The credit created by the deposit was at the customer's disposal immediately upon its creation. The status of the accused was fixed, as regards guilt under the statute, the instant the deposit was accepted as creating a credit, liable to be called for at once, and was not subject to change by maturity of the depositor's indebtedness thereafter, before the bank closed, so as to absorb a part or the whole of it. Had the deposit been made on account of the indebtedness about to mature, and to be applied thereon, or made on account of an overdraft so as to operate to discharge the depositor's indebtedness to the bank, the case would be far different. True, it would be absurd to hold that a deposit, in form, which, in practical effect, is only payment of an indebtedness on an overdrawn account, would satisfy the statutory call for a deposit of money or other thing used as money and subject to be recalled in money. Such call contemplates a deposit such as will create the relation of debtor and creditor between the parties, or bailor and bailee, or the relation of principal and agent, the former only being material to this case.

A witness who, upon the voir dire, was supposed to have shown special knowledge of the character of commercial paper made by parties in the city of Ashland and its vicinity, was permitted to give his opinion, generally, of the value of specific pieces of paper mentioned to him, about the time of the occurrences, material to the case. He was not asked as to whether he knew the reputation of the maker or indorser of the paper as to solvency, but as to the value of the paper as a commodity in the community, from the standpoint of whether the parties named, to the knowledge of the witness, had any property out of which the same could be collected. He stated definitely that his testimony was based not on knowledge of whether the parties possessed property or not, but on ignorance of whether they had any. The motion made to strike out such testimony should have been granted. True, if the witness had shown, with any degree of fairness, on the voir dire, that he knew the reputation of the makers of the paper for solvency, he might have been permitted to testify to such reputation. True, evidence of the general reputation of a person for financial responsibility is relevant on the question of his solvency. That does not seem to have been directly passed upon by this court, but it has by many, and may be said to be entirely settled, though not by universal authority. We will not go into the subject at length, but state, with approval, that the rule is as indicated. The following are a sample of a multitude of judicial authorities on the subject: Hahn v. Penney, 60 Minn. 487–490, 62 N. W. 1129; West v. St. Paul National Bank, 54 Minn. 466, 56 N. W. 54; Angell v. Rosenbury, 12 Mich. 241; Bank of Middlebury v. Town of Rutland, 33 Vt. 414.

The evidence discussed was not of the character of opinion evidence as to reputableness for solvency. True, on cross-examination,

Digitized by Google

there was some evidence from the witness that he testified, from reputation, as to the financial standing of one maker of a note brought to his attention, but, in general, his evidence was confined to opinions on the basis before indicated. He gave no evidence that he, in fact, knew whether the debtor had property or not. On the whole, it seems that the evidence was not relevant. It did not approach near enough to the real point at issue to have sufficient probative force to be within the realms of competency. Therefore, in the opinion of the court, it should have been stricken out as indicated.

Complaint is made because the court permitted much evidence as regards financial condition of debtors of the bank, particularly the proprietors, long after the suspension, without direct proof that the same condition existed at the time of the occurrences charged in the indictment. A judgment against the accused for $32,526.33, in favor of the receiver of the bank, rendered some six months after the suspension, covering substantially all the liabilities of the accused to the bank, was received. Similar proof was made as to other debts to the bank in connection with evidence of unsuccessful efforts to collect on the judgments. Much of this evidence, so far as direct effect was concerned, related to the condition of things from six months to some over a year after the deposits were alleged to have been wrongfully received.

It is an elementary principle of evidence that, as a general rule, presumptions do not run backward; that while "when the existence of a person, a personal relation, or state of things is once established by proof, the law presumes that the person, personal relation, or state of things continues to exist as before, until the contrary is shown, or until a different presumption is raised from the nature of the subject in question." State ex rel. Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Greenl. on Evidence, § 41. There is no retroactive evidentiary inference, especially reaching backward materially. So, proof of insanity or solvency at a particular time is not competent to prove, on the principle of natural and probative relation, the same condition a considerable period prior thereto. But the question of whether a circumstance is of sufficient probative force to have the dignity of a legal presumption of fact, establishing the matter in controversy, prima facie, as in case of the rule stated, is one thing, and that of whether it is so utterly void of probative power as to be outside the realms of competency and so irrelevant, is quite another.

It must be conceded that, while evidence of the character of that in question might not establish a condition which would raise a legal presumption running backward, if the condition were not too remote it would not be entirely without evidentiary consequences. Such consequence might be considerable under some circumstances. For instance, in case of proof of entire want of assets to meet liabilities a few days after the particular time vital to a controversy. It would, necessarily, diminish in weight, according to remoteness, and eventually become so shadowy as to pass into the realms of conjecture, and so outside the field of competency, thereby becoming wholly irrelevant. Within a considerable field, the primary question, as to admissibility, would be one of competency, in which field, as in all others where the trial court is required to determine matters

Digitized by Google

of fact, there is a broad range for the exercise of judgment, in which the trial court is quite supreme, so much so, that its rulings should not be disturbed unless clearly wrong. Emery v. State, 101 Wis. 627–648, 78 N. W. 145; Johnson v. State, 129 Wis. 146–152, 108 N. W. 55, 5 L. R. A. (N. S.) 809.

It is the opinion of the court that considerable of the evidence objected to was improperly received under the principles suggested; particularly, judgments against persons who, before the suspension, divested themselves of all of their property by turning it over to the bank on account of the very indebtedness represented by the judgments subsequently rendered, and, further, in view of the failure of counsel to make good the pledge given to the court at the time the evidence was received that evidence would be offered that there had not been any substantial change in the financial condition of the persons, to whose status the remote evidence related, from the time of the occurrences charged in the indictment down to the time of the remote condition proved, or attempted to be proved. These general observations are all that seems necessary on this branch of the case.

The trial court gave instructions excepted to, and refused to give instructions requested, upon the theory that the value of the property of the land company turned over to the bank on account of liabilities of the stockholders, in the main, February 3, 1904, could not be considered, on the question of whether the bank was unsafe or insolvent to the knowledge, or with good reason for knowledge, on the part of the accused, at any time prior to such date, but could be from and thereafter. That, it seems, was manifestly wrong and a wrong which, quite likely, was fatal to the accused, as to the first and second counts, inasmuch as, while the accused was acquitted as to the circumstance that happened a few days after the land company's property was turned over to the bank, he was convicted as to that which happened the day before and the one which happened five days before.

It seems that, aside from the interest which Mrs. Loranger and Mrs. Kennedy had in the land company, such company's property, from a legal standpoint, was behind the liability of the debtor, stockholders of the bank, substantially the same on the 29th day of January, 1904, as on the subsequent dates material to the case. Since there was an understanding prior to the 29th, to which Mrs. Loranger and Mrs. Kennedy were parties that all the land company's property should be turned over to the bank on account of the liabilities of the stockholders thereto to strengthen its resources, and particularly as the accused had, as it seems, sufficient influence with his associates to secure their co-operation as to anything he desired done to strengthen the bank — he had substantially the same reason on January 29, to consider the value of the land company property with reference to the solvency of the bank, as at any later time. In the light of the result of the trial as to the third count in the indictment, it seems reasonably certain that had the case been presented to the jury in this way, there would have been a verdict of not guilty on all the charges. There can hardly be any mistake about that in view of the undisputed evidence that, considering the land company property, the cash value of the bank assets, at the times in question, as the accused had a right to view them, exceeded the liabilities to depositors by about forty per cent.

Digitized by Google

On the question of whether there was the excess stated, we have little or no doubt. We have checked over carefully the claim in that regard by counsel for the accused, and find it substantially correct. There is no substantial claim to the contrary in the brief of counsel for defendant in error. On the oral argument counsel were pointedly challenged in respect thereto several times from the bench, and, while they did not concede there was such excess, their attitude was such as to suggest, very strongly, that they were not prepared to more than deny that there was assets of a convertible character sufficient to enable the bank to meet its liabilities in the ordinary course of business, or enough to pay anywhere near all the debts, as it turned out.

The latter condition mentioned is not very persuasive as to the condition of mind of the accused, or the knowledge he should have had on the 29th day of January, 1904. It is a matter of common knowledge that assets in the hands of a going banking concern are regarded very differently from the same assets, upon the bank going into forced liquidation. The change of circumstances is quite likely to depreciate the value of the securities to a very marked degree.

The learned trial court charged the jury, over and over again, that whether the bank was insolvent on the particular days material to the case, turned on whether it had sufficient assets to meet its liabilities in the ordinary course of business, and whether the accused at such time had good reason to know the bank was unsafe or insolvent, was whether he had such reason to know it did not possess sufficient assets to pay all its liabilities as they matured and became payable in the ordinary course of business. On the other hand, the learned court refused to instruct the jury that the statutory test was whether the fair value of the assets on the particular days named was sufficient to cover the liabilities, exclusive of liabilities to stockholders.

In view of the situation that, according to the undisputed proof there was an excess of assets over liabilities, within the rule requested to be given to the jury, the error in refusing such request, if there were error in that regard, was prejudicial in the highest degree, since such request, in view of the evidence, was, in effect, one to render a verdict in favor of the accused.

There is no question but what insolvency, as the subject is dealt with under the insolvent and bankrupt laws, regarding a condition where, by the theory of such laws, the person or concern should suspend and take such measures or submit to such, for the protection of creditors, as to insure equality of treatment, is as the court instructed the jury. That is the limited, not the common, popular or general meaning of the term. The latter suggests, merely, a substantial deficiency of assets to cover liabilities. In a multitude of authorities involving administration of bankrupt and insolvent laws and situations properly classible therewith, the authorities mainly relied upon by the prosecution, insolvency is viewed in the limited sense, while the general sense is universally conceded to be as indicated. So it will be seen that a bank may be insolvent in the limited sense and clearly not in the broad general sense.

Must the limited meaning be given to the term "unsafe or insolvent" as used in the statute? Is it true that, under all circumstances, the proprietors of a bank, though believing they have an abundance

Digitized by Google

or assets to pay out within a reasonable time all liabilities to depositors, must close the doors and go into liquidation whenever they have good reason to know they will, or probably may, not be able to pay all demands upon the bank in the usual course of business, and that every moment of time they keep open for business thereafter they are criminals before the law and liable to be prosecuted and punished by long terms of confinement in the State prison? If such is the law, the banking business is exceedingly unattractive, and the more conscientious the banker is, the less attractive it is.

It must be seen, at once, that the statute is open to construction. The words used have the two well known and widely different meanings. By the familiar rule that, in general, the common ordinary meaning of words in a law is to be taken as the one intended by the legislature, we must discover some efficient reason for holding that, it did not have in mind, in enacting the law in question, the one which the learned trial court rejected.

While it is reasoned by some courts that the mischiefs to be guarded against by such legislation, suggest the limited meaning as intended, such reasoning is not satisfactory and is not in accord with the reasoning of other just as respectable courts holding to the contrary view.

There is no more legitimate business than that of banking. There are laws for the promotion of it, beneficial to those engaged therein and the patrons, in every civilized nation on earth. Our laws contemplate that all but a small portion of the deposits in a State bank and all of its capital stock may be loaned for considerable periods of time and with quite a proportion on real estate security. It is permitted to put twenty-five per cent. of its capital and surplus into banking house and fixtures. It is permitted to loan fifty per cent. of capital, surplus and deposits upon real estate security, and without limit in this and adjoining States when authorized by a resolution of two-thirds of the board of directors. There is a legal limit upon the amount that may be loaned directly to one person, but there is no limit whatever as to indirect loans, and no limit as to loaning on approved security of a single borrower, short of the whole capital stock and surplus, in case of two-thirds of the directors consenting thereto by a duly recorded vote. There is no limit as to time upon which loans may be made. Notwithstanding this broad discretion the law only requires a reserve on hand in cash, either in bank or available in correspondent reserve banks, of fifteen per cent. of the deposits.

In the situation indicated, would it be reasonable to suppose that a bank must at all events be prepared to pay every one who calls his credit in the usual course of business, under peril of the severe punishment provided in section 4541 of the statutes of 1898? Must persons engaged in such business, while not going outside the permitted methods with bad intent, upon every occasion of their competency to pay in the usual course of business being challenged, regardless of competency to pay ultimately, be conscious of drifting within the shades of prison walls; into realms of everlasting disgrace for themselves and their families? The very picture, not at all overdrawn it is thought, suggests, most forcibly, that such a meaning as the learned trial court attributed to the statute would lead to the most absurd results. That of itself would require rejection of such mean-

Digitized by Google

ing, there being another perfectly reasonable, and fairly at least, appropriate one.

The reasons suggested for not adopting the drastic meaning attributed to the statute by the trial judge, suggested from the viewpoint of the banker, is reinforced by one quite as persuasive from the point of view of patrons of a bank. It is a matter of common knowledge that liquidation of a bank in insolvency proceedings is inevitably attended with great losses which commonly fall on the depositors. So when a banker stands face to face with a condition of probable inability, merely, to pay all liabilities "in the ordinary course of business," he knows that to go into liquidation, unless that is absolutely necessary, is inviting disaster for the depositor often in far greater measure than to persist in going on. Premature suspension or unnecessary suspension often is the very worst thing that could happen to the persons the statute is designed to protect. In that situation, if the statue were construed as the counsel for defendant in error contend it should be, the fabled position of most unfortunate danger would be quite real, the banker while bending all his energies to perform his duty of avoiding danger on the one side would be quite likely to fall into a still greater danger on the other. Avoiding Scylla, he would fall into Charybdis.

Looking to our own decisions we find that the precise question under discussion has not been heretofore treated. Our attention is called to Baker v. State, 54 Wis. 368, 12 N. W. 12; In re Koetting, 90 Wis. 166, 62 N. W. 622; State v. Shove, 96 Wis. 1, 70 N. W. 312, 37 L. R. A. 142, 65 Am. St. Rep. 17, but in neither is the question discussed or helpfully alluded to, much less decided. The same condition exists in most all the adjudications elsewhere under similar statutes. The secret of that, doubtless is, that only in rare instances has there been a prosecution of this sort unless the bank was so hopelessly insolvent that its condition in that regard satisfied every meaning of the term insolvency, beyond question.

In State v. Cadwell, 79 Iowa 432, 44 N. W. 700, the bankruptcy rule was adopted, citing in support thereof wholly civil cases where such rule is appropriate. The reasoning in the opinion does not appeal favorably to our understanding. It is wholly from a one sided point of view. The bank there was insolvent under any rule and unquestionably so. Reference is made to a federal case, without stating where it may be found, but it is sufficiently identified to point, unmistakably, to Dodge v. Mastin (C. C.), 17 Fed. 660. Turning thereto, we find that it held that a bank may be insolvent in the limited sense the term is used in bankruptcy matters; it may even be forced to close its doors for want of money to pay all calls upon it in the ordinary course of business — and yet not be insolvent within the meaning of the criminal law. It was said: "A bank is solvent, within the meaning of the constitution and the statutes we are considering, when it possesses sufficient of assets to pay within a reasonable time all its liabilities through its own agencies." The Iowa case has been cited with a measure of approval in some instances, but not in any one of consequence of this sort, so far as we are able to discover. It must be conceded it has some support in State v. Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179; Queenan v. Palmer, 117 Ill. 619, 7 N. E. 470, 613; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176, 54 Am. St. Rep. 447; State v.

Digitized by Google

Myers, 54 Kan. 206, 38 Pac. 296. In a pretty full review of authorities in an article in 37 Cent. Law J. 147, it is condemned, authorities being cited and logic used to the conclusion that a bank is not unsafe or insolvent, in the language of the criminal law, if its property is worth more than all its liabilities, even though it be in a condition, at the time of receiving a deposit, that it has to default soon on maturing liabilities. We should remark, in passing, that the author took note of the fact that in the Iowa case, the bank was hopelessly insolvent within the meaning of the term, so the court did not need to go to the extent it did. For that reason, we may well apprehend, the question did not receive the attention, at the hands of the court, it otherwise would.

We will close this opinion without any extensive review of authorities. We venture to say that, in all situations except in respect to the administration of bankruptcy and insolvency laws, the term under consideration is regarded as contemplating insufficiency of assets, in money value, to balance liabilities, such money value to be realized, not by a forced and involuntary sale, but by handling in the ordinary way an ordinarily prudent man would generally conduct his business under the same or similar circumstances.

The following are examples of the application of the rule we have stated: Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 81 N. W. 876; Marvin v. Anderson, 111 Wis. 387, 87 N. W. 226; Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188; Livingston v. Bank of New York, 26 Barb. (N. Y.) 304–308; Walkenshaw v. Perzel, 32 How. Prac. (N. Y.) 233. The position of this court on the general question is well summarized in the syllabus to Hamilton v. Menominee Falls Quarry Co., supra, thus:

"Insolvency, in such connection, does not mean an insufficiency of quick assets to pay all debts at once, nor ability to meet commercial obligations as they fall due in the course of business, but that the property of the corporation, real and personal, estimated at a fair and reasonable valuation, is substantially less than its debts."

There is a peculiarity in our statutes, perhaps distinguishing it from the Iowa statute and certainly from those of Indiana, Kansas, Illinois and in many other States. The word "insolvent" only is used in most statutes, while that, in connection with the word "unsafe" is used in ours. Not in the disjunctive, as said in Re Koetting, supra, to suggest separate conditions forming bases for the criminal liability, but as "legal equivalents," the latter word to explain and emphasize the first. That fairly indicates that the legislative idea was something more than insolvency in the limited sense.

An examination of the statutes of other States fails to disclose any similar use of words in a similar statute, except in Minnesota. Chapter 219, p. 504, Laws 1895. The Supreme Court of that State in State v. Clements, 82 Minn. 434, 85 N. W. 229, in defining the term rejected the idea of competency to pay liabilities "in the ordinary course of business," adopting this, by way of approval of the trial court's instruction on the subject:

"If the assets of a banking firm and of the individual members thereof are insufficient in value to pay the debts of such firm, then such firm is insolvent. A bank or banking firm is solvent, within the meaning of the statute, when it and its several members possess assets of sufficient value to pay within a reasonable time all its lia-

Digitized by Google

bilities through its own agencies, and is insolvent when it and its individual members do not possess assets of such value."

We approve of that, substantially, preferring, however, to express it in this way: The term "unsafe or insolvent" in section 4541, St. 1898, has regard to deficiency of assets, realizable in cash value within a reasonable time, treating them as an ordinarily prudent person would ordinarily conduct his business, to cover liabilities exclusive of stock liabilities. A bank is insolvent when the fair cash value of its assets, realizable within a reasonable time, in case of liquidation by the proprietors, as ordinarily prudent persons would ordinarily close up their business, is equivalent to its liabilities, exclusive of stock liability.

That gives a sensible construction to the statute, treating the banking business with the consideration it deserves both from the standpoint of patrons and patronized, instead of treating those engaged therein, and responsible for the safety of the cash and idle capital of the country, and responsible for the correctness of the innumerable exchange transactions of business in every-day life, as if they were a dangerous class, to be fenced about as classes generally are, of criminal tendencies. It provides punishment for the really bad and without crushing the merely unfortunate, and subjecting all, or a large proportion, in perilous financial periods, to worriment of unreasonable menace.

A point made that the law under which the grand jury was drawn which found the indictment is unconstitutional, because it denies to an accused person the equal protection of the laws and due process of law, is ruled in favor of the defendant in error by State ex rel. Gubbins v. Anson, 132 Wis. 461, 112 N. W. 475; Vought v. State, 135 Wis. 6, 114 N. W. 518, 646.

There is no other question which needs discussion or even mention. The judgment must be reversed. Whether the cause should be remanded with directions to discharge the accused upon the ground that he should have been discharged on the case and motion made therefor below, is not free from difficulty. That such a course would be the right administration, in a clear case of uselessness of a new trial, within the contemplation of the code which on reversal requires the cause to be remanded for a new trial, only when necessary; that is, only when justice, in the judgment of this court does, or seemingly may, demand it. Section 3071, St. 1898, has been vindicated many times in recent years. Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800; Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. (N. S.) 84, 115 Am. St. Rep. 977; Miller v. State (decided February 16, 1909, not officially reported), 119 N. W. 850.

When it is clear that a full trial has been had and that a new trial would not be liable to change the situation, assuming that the witnesses who testified, cannot honestly do more than repeat their testimony, public and private interests as well demand that, upon a reversal here, such disposition should be made of the matter as to terminate the litigation.

Because of the probability, amounting to almost reasonable certainty, in view of the verdict on the third charge, that under proper instructions there would have been a full acquittal, and other circumstances in the case — a demand for a new trial, from the standpoint of public justice, is not very clear. However, since the case was

Digitized by Google

tried on quite an untenable theory, it is the opinion of the court that it should be remanded for a new trial, which will not preclude the prosecuting attorney, if he shall deem best, from dismissing the cause with consent of the trial court.

The judgment is reversed, and the cause remanded for a new trial.

WINSLOW, C. J., and BARNES, J., took no part.

Decision No. 1147.

FIRST STATE BANK OF PLEASANT DALE v. BORCHERS.

(Supreme Court of Nebraska. February 20, 1909.)

120 N. W. 142.

BILLS AND NOTES — BONA FIDE PURCHASER — KNOWLEDGE OF DEFENSES — DEFENSES — FRAUD IN PROCURING EXECUTION — PAYMENT — SUFFICIENCY — DELIVERY OF BANK DRAFT.

1. The fact that the circumstances surrounding the purchase of a negotiable promissory note before its maturity were sufficient to excite the suspicion of a prudent man concerning the instrument will not defeat a recovery. The proof must establish that the purchase was made with knowledge of the facts concerning the execution of the note, that plaintiff believed that there was a defense to the instrument, or that he acted in bad faith or dishonestly.

2. Defendant having testified that he was induced to sign a negotiable instrument upon the representation of the payee, which he relied on, that it was a copy of an agreement for the use of a farm gate and that he could not read the English language, it was not error to instruct the jury, the evidence being considered, that it was defendant's duty to read the instrument or have it read to him, and if he could not himself read the writing, to "otherwise learn the contents," so that he might not be imposed on and cause an innocent purchaser to suffer, and that it was for the jury to say from all of the facts and circumstances of the case whether defendant had been negligent in the care exercised by him to learn the contents of the note.

3. If a purchaser of a negotiable instrument gives the holder an ordinary bank draft therefor, payment is complete as soon as said draft has passed beyond the buyer's control.

(Syllabus by the Court.)

Appeal from District Court, Lancaster County; Cornish, Judge.

Action by the First State Bank of Pleasant Dale against John Borchers. Judgment for plaintiff, and defendant appeals. Affirmed.

Willard E. Stewart and George A. Adams, for appellant. Hall, Woods & Pond, for appellee.

ROOT, J. Action on a negotiable instrument by an indorsee thereof. Plaintiff prevailed, and defendant appealed.

The defense is that defendant's signature to the note in question was procured by fraud and deceit and upon the payee's representation that it was a copy of an agreement relative to an option to purchase a farm gate; that defendant cannot read the English language, and re-

Digitized by Google

lied on the payee's statements; also a denial that plaintiff was a bona fide purchaser. The testimony tends very strongly to prove that the payee did cause defendant to believe that he was merely signing a writing concerning a gate. The payee on the day that the note was executed sold it for nearly par to one Laune, and indorsed the note: "Without recourse. R. H. Browning." Laune sold the note to plaintiff about the 13th of July, 1905, and received $100 therefor.

1. The first complaint is that the court refused to give instruction numbered "V," requested by the defendant, but gave its instruction numbered "V." They are as follows:

"Where to an action on a promissory note by an indorsee thereof the defense interposed is fraud, or illegality in the inception of the note, or in procuring its execution, the burden of proof is upon the plaintiff to prove that he is a bona fide holder; that is, that he purchased and paid for the note without knowing that the maker claimed any defense thereto, and that he made such purchase before the note became due for a valuable consideration, and that such purchase was made in the usual course of business, without any notice of facts or circumstances which would prompt an ordinary prudent make (man) to investigate, or make inquiry, which if followed up, or made, would have led to knowledge of such defense."

"The mere fact that circumstances at the time of the purchase of the note may be such as to excite suspicion in the mind of a prudent man is not sufficient to impugn the title of an innocent purchaser. The proof must go to the extent of showing that the purchaser purchased with knowledge of such facts and circumstances as shows want of honesty or bad faith on his part in the purchase of the note."

We have condemned an instruction that requires a purchaser of negotiable paper before maturity to follow up by inquiry any suspicious fact or circumstance relative to the note that may come to his attention at or before the date of his purchase. First National Bank v. Pennington, 57 Neb. 404, 77 N. W. 1084. To constitute bad faith, the buyer must have had knowledge of infirmities in the note, or have had a belief based on circumstances known to him that there was a defense thereto, or the evidence must tend to prove that the purchase was made under such circumstances as indicate bad faith or a want of honesty on the part of the indorsee. Dobbins v. Oberman, 17 Neb. 163, 22 N. W. 356; Myers v. Bealer, 30 Neb. 280, 46 N. W. 479; First National Bank v. Pennington, supra; Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402; Second National Bank v. Morgan, 165 Pa. 199, 30 Atl. 957, 44 Am. St. Rep. 652. Instruction "V" requested by defendant is not a correct statement of the law, nor is instruction "V" given by the court erroneous.

2. It is urged that instruction numbered 7, given by the court, is erroneous. The portion criticised is as follows: "Touching this, you are instructed that it is the duty of one signing his name to an instrument to read it, if he can read it, or to bring such ability to read as he possesses into use, so far as it may enable him to identify the character of the instrument, or, if he cannot read at all, to otherwise learn the contents of the instrument he is signing, so that he may not be imposed upon by fraud, or sign a note that may cause innocent purchasers thereof to suffer. He is chargeable with any neglect in failing to perform this duty. Whether or not the defendant was guilty of any neglect in signing the note the way he did is a question

Digitized by Google

of fact for you to determine from all the facts and circumstances of the case, taking into consideration the evidence as it may bear upon the question to what extent the defendant was illiterate, and whether or not he was without negligence in the care exercised by him to know the contents of the instrument before he signed it." Counsel complains that the court did not in said instruction inform the jury that, if plaintiff was not an innocent purchaser, he could not take advantage of the negligence of defendant in not ascertaining the nature of the writing signed by him. The court, however, did not tell the jury that plaintiff could recover if defendant was negligent without regard to the bona fides of the bank. In instruction numbered "II" the jurors were told that plaintiff could not recover unless it purchased the "note in good faith before maturity, and for a valuable consideration, in the usual course of business." It is also argued that defendant was placed under the necessity of proving a greater degree of diligence than the law imposes, but we cannot agree with counsel. Dinsmore & Co. v. Stimbert, 12 Neb. 433, 11 N. W. 872; Ruddell v. Fhalor, 72 Ind. 533, 37 Am. Rep. 177; Fisher v. Von Behren, 70 Ind. 19, 36 Am. Rep. 162; Bedell v. Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 307; Williams v. Stoll, 79 Ind. 80, 41 Am. Rep. 60; Lindley v. Hoffman, 22 Ind. App. 237, 53 N. E. 471; Mackey v. Petersen, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211.

3. Upon defendant's request the court had instructed the jury that, if plaintiff before he paid for the note in suit learned that defendant claimed that it had been obtained by fraud, it ought not to have paid therefor, that it must use ordinary care to stop payment of the draft, and that it would not be a purchaser in good faith. The jury evidently requested further instructions, and the court then added to said instruction the words "if he failed to exercise such ordinary care," and then further instructed: "Touching this twelfth instruction, you are further instructed that by it is meant only that if the plaintiff should get notice that the defendant claimed that the note was obtained by fraud, and that he had a defense to that note, before he had completed the purchase of the same, then it would become his duty not to complete the purchase. If, however, on the other hand, the evidence should show that at the time he learned of the defendant's defense to the note he had already purchased the same, so that as between the plaintiff bank and the owner of the note, Laune, the bank was then holden for the payment of the consideration, then in such case the bank would still be an innocent or bona fide purchaser. If at the time of receiving the notice the sale was so far completed by giving Mr. Laune credit on his pass book for that amount by the Columbia National Bank, so that as between Laune and the Columbia National Bank the purchase was completed, then in such case the plaintiff, being liable for the amount, although the draft was not yet cashed, and he must stop its payment, would be an innocent holder." In connection with his criticism of this amendment, counsel argues that the evidence disclosed that plaintiff had knowledge before paying for the note that defendant claimed a defense thereto. The first purchaser from the payee offered the paper for discount to a bank in Lincoln where he kept an account, but the cashier stated that the instrument had originated in territory tributary to plaintiff, and it must be given the first opportunity to buy. About July 4th plaintiff's cashier, Ackerman, talked with the cashier of the Lincoln bank about

Digitized by Google

the note and again on the 10th of that month. Ackerman noticed that the note was indorsed "without recourse," and asked the reason, and whether there was anything wrong with it. The Lincoln man said that it had been deposited by one of their best customers, and that he had every reason to believe that it was all right. Ackerman then said to send it to him, and, if the signature was genuine, he would purchase the paper. The note was sent to plaintiff, and Ackerman compared the signature thereto with defendant's genuine signature. July 13th Laune inquired of the Lincoln bank what had been done with the note. Ackerman was communicated with over the phone, and replied that plaintiff would take it, and sent a draft to said bank for $100. The Lincoln bank was plaintiff's correspondent, and credit was given Laune and plaintiff's account charged July 14th. Ackerman testified that his first knowledge that defendant claimed a defense to the note was acquired August 7th, whereas defendant asserts that he told him in the forenoon of the 13th of July that the instrument was procured by fraud. There is considerable evidence in the record corroborative of both Ackerman and defendant sufficient to support a finding for one party or the other, but it was for the jury to settle the issues of fact upon the conflicting testimony. The qualification to the instruction was not erroneous in the light of the testimony. If, as indicated by plaintiff's evidence, Laune was credited on the books of the Lincoln bank with plaintiff's draft before it had notice of any infirmity in the note, the consideration for said purchase was as completely beyond plaintiff's control as if it had paid currency to Laune therefor. The official reporter read for plaintiff the testimony of an absent witness who had testified on the former trial of the case. It was shown that the witness was in Seward county, and that an unsuccessful attempt had been made to procure his presence. Defendant also caused the reporter to read the testimony of an absent witness, and we are satisfied that the judgment should not be reversed because the witness was not produced in court.

Defendant was evidently imposed upon by the payee of the note, but he has had a fair trial before a jury on all of the disputed facts. The instructions were complete and fair, and now that the jury has found that plaintiff purchased the note in question before its maturity in the usual course of business bona fide for a valuable consideration and without notice of any infirmity therein the judgment should be and is hereby, affirmed.

Digitized by Google

Decision No. 1148.

MANUFACTURERS' COMMERCIAL CO. v. BLITZ.

(Supreme Court, Appellate Division, First Department. March 5, 1909.)

115 N. Y. Supp. 402.

CORPORATIONS — NATURE AND FORM — PRESUMPTIONS — FOREIGN CORPORATIONS — RIGHT TO SUE — LICENSE — PROOF — ACTIONS — LICENSE TO DO BUSINESS — BURDEN OF PROOF — TRANSFER WITHOUT INDORSEMENT — "HOLDER IN DUE COURSE."

1. A foreign corporation, organized to buy and sell accounts, make contracts, and purchase outstandings, will be assumed, in the absence of proof to the contrary, to be a stock corporation.

2. Unless a foreign corporation, doing business in New York, has obtained the license required by General Corporation Law (Laws 1892, p. 1805, c. 687), § 15, before making a contract within the state, neither the corporation nor its assignee can maintan action thereon in New York.

3. In an action by an assignee of a foreign corporation on a New York contract, the burden is on the plaintiff to prove that the corporation obtained a license to do business before making the contract, as required by General Corporation Law (Laws 1892, p. 1805, c. 687), § 15.

4. Under Negotiable Instruments Law (Laws 1897, p. 731, c. 612), § 79, providing that, where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferee obtains such title as the transferror had, an assignment of a note payable to a foreign corporation or order, without indorsement, does not make the assignee a holder in due course, as defined by Negotiable Instruments Law, §§ 2, 60, 61, 91, and 98.

Appeal from Trial Term, New York County.

Action by the Manufacturers' Commercial Company against Henry Blitz. From a judgment for plaintiff on a directed verdict, defendant appeals. Reversed, and a new trial granted.

Argued before INGRAHAM, McLAUGHLIN, HOUGHTON, CLARKE, and SCOTT, JJ.

Alfred Epstein, for appellant. Elbridge L. Adams, for respondent.

HOUGHTON, J. The action is upon a promissory note given by the defendant June 10, 1904, to the Manufacturers' Commercial Company, a New Jersey corporation, or order, payable in one year. The plaintiff, bearing the same name, is a New York corporation, and is the successor of the New Jersey corporation, and the complaint alleges that it is the owner of the note in suit by assignment and transfer. This allegation of the complaint was admitted by the defendant's answer. The note does not bear the indorsement of the payee, but was produced upon the trial by the plaintiff; and it is fair to assume, from such evidence as appears, that the plaintiff was organized for the purpose of taking over the assets of the foreign corporation and succeeding to its business, and that it took over such assets, including

Digitized by Google

the note in suit. The business of the plaintiff, which is the same as that carried on by its predecessor, which it took over, is described as being that of "buying and selling accounts, making contracts, and purchasing outstandings." From the nature of such business, and in the absence of proof to the contrary, it must be assumed that the New Jersey company was a stock corporation. The note is dated at the city of New York, and is payable at the office of the corporation in said city. By the express provisions of section 76 of the Negotiable Instruments Law (Laws 1897, p. 731, c. 612) an instrument is presumed to have been made where it is dated, and hence the contract upon which the suit is brought must be assumed to have been made in this State.

It was neither alleged in the complaint nor proved upon the trial that the New Jersey corporation had obtained the certificate permitting it to do business in this State according to the requirements of section 15 of the General Corporation Law (Laws 1892, p. 1805, c. 687, amended by Laws 1901, p. 1326, c. 538, § 1). At the close of the plaintiff's case the defendant moved to dismiss the complaint on the ground that the plaintiff had failed to allege and prove the obtaining of such certificate. This motion was denied, and on request of the plaintiff the court directed a verdict against the defendant. Plaintiff not having proved that its predecessor, the payee of the note, had obtained such certificate, could not maintain as assignee an action thereon in this State. A foreign stock corporation doing business in this State must allege and prove that it had obtained the license to do business provided by section 15 of the General Corporation Law prior to the making of the contract upon which the action is brought, and if it fails to do this neither it nor the assignee can maintain any action on such contract. South Bay Company v. Howey, 190 N. Y. 240, 83 N. E. 26; Welsbach Co. v. Norwich Gas Co., 180 N. Y. 533, 72 N. E. 1152. Proof of compliance with section 15 of the General Corporation Law must be made by the plaintiff, and in that respect it differs from proof of non-compliance with section 181 of the Tax Law (Laws 1896, p. 856, c. 908, amended by Laws 1901, p. 1364, c. 538, § 1), which is a matter of defense, and must be pleaded and proved by the defendant. Halsey v. Jewett Dramatic Co., 190 N. Y. 231, 83 N. E. 25, 123 Am. St. Rep. 546

The learned counsel for the respondent concedes that the law is as stated, but insists that the plaintiff comes within the exception pointed out in Halsey v. Jewett Dramatic Co., supra, in that this action is brought upon a negotiable instrument taken from the foreign corporation in good faith and before maturity. There is no proof in the record that the plaintiff took the note before maturity. The plaintiff holds the note, and has possession of it, and produced it upon the trial. The plaintiff is not, however, the payee, nor the indorsee, because the original payee never indorsed it over to the plaintiff by actual indorsement. Section 79 of the Negotiable Instruments Law provides, that where the holder of an instrument payable to his order transfers it for value with indorsing it, the transferee obtains such title as the transferror had; but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. Such indorsement never having been made, plaintiff cannot be deemed to be a holder in due course, as defined by sections 2, 60, 61, 91 and 98 of

Digitized by Google

the Negotiable Instruments Law. The plaintiff, therefore, failed to prove that it was the holder of the note in suit and took it in good faith before maturity, and did not bring itself within the exception stated in Halsey v. Jewett Dramatic Co., supra, so as to relieve it from proving that its transferror or assignor, the New Jersey corporation, held a certificate permitting it to do business in this State.

The omission to make such proof being in our judgment fatal, the judgment was erroneous, and must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur.

Decision No. 1149.

ZOLLMAN v. JACKSON TRUST & SAVINGS BANK.

(Supreme Court of Illinois. February 19, 1909.)

87 N. E. 297.

BILLS AND NOTES — BONA FIDE PURCHASERS — CONSTRUCTIVE NOTICE — MATTERS APPARENT FROM NOTE — NOTES SECURED BY MORTGAGE — CONSIDERATION — EQUITY — PLEADING — CROSS-BILL — PLEDGES — ACTION ON CAUSE OF ACTION PLEDGED — DEFENSE — RELEASE OF OTHER SECURITIES.

1. A recital in a promissory note which destroys its negotiability must be of a kind that in some respects qualifies or makes uncertain or conditional the promise; and a note which shows upon its face that it is secured by a trust deed is negotiable, and an innocent holder of such note will not be held to have notice that the notes were originally given to the maker's agent to raise money for the use of the maker and were by him converted to his own use.

2. Although mortgages are not assignable so as to vest the title freed from defenses, a note secured by a mortgage may be transferred to a bona fide purchaser, freed from defenses against the original holder, as the right to proceed upon the notes and have judgment at law is independent of any lien created by the mortgage.

3. The substitution of a note for other collateral constitutes the holder of the note a purchaser for value.

4. Plaintiff executed a note and trust deed and delivered them to one who promised to advance money for her use, but instead he delivered the note to defendant in exchange for another note, which he had deposited with defendant as collateral security for the indebtedness. Plaintiff brought suit to remove the trust deed as a cloud upon her title, and for the cancellation and delivery of the note. Defendant answered the bill, claiming to be an innocent holder of the note for value, and, while the suit was pending, began an action at law against plaintiff to recover a judgment on the note, which action was restrained by an order entered in the suit begun by plaintiff, and thereupon defendant filed a cross-bill asking to have a money decree in its favor against appellant for the amount of the note. Held, that the cross-bill was germane to the original bill, and plaintiff having enjoined the prosecution of the action at law on the note, cannot object to the cross-bill seeking the relief demanded in the enjoined action.

5. One who held a note under a promise to advance money to the maker transferred the note to a bank in exchange for another note held as collateral by the bank to secure the payment of an indebtedness of the holder. Held, that it was no defense

Digitized by Google

to the payment of the note in the hands of the bank that the maker was injured by a certain compromise made by the bank in regard to other collateral security the holder's indebtedness, where, if all the collateral held by the bank had been paid in full, there would still have been due to the bank on the indebtedness of the holder more than it would have obtained on the judgment on the note.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Action by Mary J. Zollman against the Jackson Trust & Savings Bank. From a judgment for defendant, plaintiff appealed to the Appellate Court (141 Ill. App. 265), where the judgment was affirmed, and she appeals. Affirmed.

Ernest Severy, for appellant. Adams & Froehlich, for appellee.

VICKERS, J. Appellant, Mary J. Zollman, executed a principal note for $7,000 together with seven interest coupon notes, payable to her order, and indorsed the same to Henry W. Howe. To secure these notes, appellant executed a trust deed to the Chicago Title & Trust Company on certain real estate owned by her. These notes and the trust deed were delivered to Henry W. Howe upon his promise to advance appellant money with which to construct a six-flat building on the premises described in the trust deed. Howe paid appellant, at the time the notes and trust deed were delivered, $18.47, which was the only money appellant received for the notes and trust deed. Howe being indebted to the Jackson Trust & Savings Bank, appellee herein, in the sum of $25,000, indorsed appellant's notes and delivered them to appellee as collateral security for his debt, and received from appellee a $10,000 note of William S. Peterson, which appellee held as collateral security, and obtained from appellee a release of a trust deed executed to secure the Peterson note. Soon after this transaction with appellee, Howe committed suicide. The appellant filed a bill in equity alleging the foregoing facts, and averring that appellee had full notice, at the time it received the notes, that no consideration had been paid for them, for the purpose of removing the trust deed as a cloud upon her title, and for the cancellation and delivery of the $7,000 principal note and the interest notes. Appellee answered the bill, in which it claimed to be an innocent holder of the notes for value, and denied all knowledge of the transaction between appellant and Howe. In the meantime, while this chancery suit was pending, the Jackson Trust & Savings Bank instituted an action at law in the Supreme Court of Cook county against appellant to recover a judgment upon the notes. Upon petition of appellant an order was entered in the chancery proceeding restraining the prosecution by appellee of the action at law. The Jackson Trust & Savings Bank then filed a cross-bill in this case for the purpose of having a money decree entered in its favor against appellant for the amount due upon the notes. Upon the final hearing in the court below a decree was entered in accordance with the prayer of the original bill in so far as the trust deed is concerned. The court, however, refused appellant any relief upon the notes, but granted the prayer of the cross-bill, and rendered a money decree against appellant for the amount due on the notes. Appellant appealed the cause to the Appellate Court for the First District, and from a judgment affirming the decree below she has prosecuted the further appeal to this court.

Digitized by Google

The appellant contends that, since the notes in question showed upon their face that they were secured by a trust deed, appellee cannot be regarded as an innocent holder of such notes, and that the purchaser should be held to have notice of all facts that inquiry would have disclosed. This is a misapprehension of the effect of such recital. A recital upon a promissory note, to destroy its negotiability, must be of a kind that in some respects qualifies or makes uncertain or conditional the promise. Siegel, Cooper & Co. v. Chicago Trust & Savings Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 40; Biegler v. Merchants' Loan & Trust Co., 164 Ill. 197, 45 N. E. 512. In the case last above cited it was held that a note which recited that "this note is secured by a lien upon my interest in certain horses described in agreement this day made between G. W. Leihy and myself" was nevertheless a negotiable instrument, and that a purchaser for value before maturity held such note free from any latent defenses that the maker might have against the payee.

Appellant insists next that under the law of this State there can be no innocent holder of notes secured by mortgages or trust deeds. To this we cannot assent. Ever since the case of Olds v. Cummings, 31 Ill. 188, was decided, the law has been regarded as well established in this State that mortgages and trust deeds were not assignable so as to vest the title freed from any defense which the maker had against the original mortgagee or grantee. But this rule has no application to the rights of an innocent holder of negotiable promissory notes to secure which such mortgage or trust deed is executed. The legal right to proceed upon the notes and have a judgment at law is independent of any lien created by mortgage or trust deed. Martina v. Muhlke, 186 Ill. 327, 57 N. E. 954.

It is next contended by appellant that the substitution of appellant's notes for other collateral which appellee held to secure Howe's debt does not constitute appellee a purchaser for value of appellant's notes. This question has been determined by this court adversely to appellant's contention in the case of Manning v. McClure, 36 Ill. 490. In the case above cited this court, after an extended review of authorities outside of this State, laid down the rule, on page 499, as follows: "We are led, then, by what we consider the equities between the parties and by the acknowledged policy of giving stability to negotiable paper, to hold that the indorsee of such paper, before its maturity, taking it as payment or security for a pre-existing debt and without any express agreement, shall be deemed a holder for a valuable consideration in the ordinary course of trade, and shall hold it free from latent defenses on the part of the maker." This rule has been adhered to in subsequent cases. Butters v. Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Doolittle v. Cook, 75 Ill. 354; Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Mix v. National Bank of Bloomington, 91 Ill. 20, 33 Am. Rep. 44; McIntire v. Yates, 104 Ill. 491.

Appellant contends next that the court below erred in rendering a money decree against her upon appellee's cross-bill. Her contention on this point is that the matters set up in the cross-bill were purely legal, and were therefore not cognizable in a court of equity. Even though the matters set out in the cross-bill were purely legal, the appellant having brought appellee into equity upon matters of exclusive equitable cognizance, she cannot now be heard to question the jurisdiction of the court of equity over the matters set up by appellee

Digitized by Google

in its cross-bill. Quick v. Lemon, 105 Ill. 578; Story's Eq. Pl., § 399. It must be borne in mind that by her original bill appellant brought these notes into question and prayed relief in respect thereto. The cross-bill, therefore, was germane to the original bill. Appellee, on petition of appellant, had been enjoined from the prosecution of its action at law upon the notes. It would seem to be highly inequitable to require appellee to institute another action at law merely for the purpose of obtaining a judgment upon the notes when the court of equity had before it the proper parties and the subject-matter to enable it to do complete justice between the parties.

It is finally contended by appellant that she was injured by certain compromises that were made by appellee in regard to other collateral which it held to secure Howe's indebtedness to the bank. It is a sufficient answer to this contention to say, that, if all the collateral held by appellee had been paid in full, there would still have been due appellee more than it will obtain on the judgment against the appellant.

We find no reversible error in the judgment of the Appellate Court. It will accordingly be affirmed.

Judgment affirmed.

Decision No. 1150.

VAN NORDEN TRUST CO. v. L. ROSENBERG, Inc., et al.

(Supreme Court, Appellate Term. February 15, 1909.)

114 N. Y. Supp. 1025.

CORPORATIONS — NOTES — INDORSEMENT — SUFFICIENCY — BILLS AND NOTES — "HOLDER FOR VALUE" — AUTHORITY — RATIFICATION — APPEAL AND ERROR — DEFENSES IN LOWER COURT — NECESSITY OF MAKING — ACCOMMODATION INDORSEMENT.

1. The treasurer of a corporation, authorized to pledge its credit and sign notes on its behalf, who indorsed on a note the name of the corporation, followed by his own name, bound the corporation, through the office of the treasurer was not designated in the indorsement.

2. The variance between the name of a corporation "L. Rosenberg, Incorporated," and the indorsement of a note, "Louis Rosenberg, Inc.," is harmless, and does not defeat the intention of the officer of the corporation, indorsing the note on its behalf, to bind it.

3. The form, in an indorsement of a note, of the name of a corporation is immaterial, where the corporation intended to be bound thereby, and especially where it received the benefit of the transaction with full knowledge.

4. A treasurer of a corporation, authorized by its board of directors to pledge its credit and to sign, indorse, accept, make, execute, and deliver all notes on its behalf, has authority to indorse a note on its behalf and bind it thereby.

5. Where the holder of a note for $2,000 surrendered it after a payment of $500 and accepted a new note for $1,500, executed by the makers and indorsed by a corporation, the holder of the new note was a "holder for value," within Negotiable Instruments Law (Laws 1897, p. 727, c. 612), § 52, providing that, where value has been given for an instrument, the holder is deemed a holder for value.

Digitized by Google

6. In an action on a note indorsed by a corporation by its treasurer, who signed its name, followed by his own name, evidence held to justify a finding that the treasurer had authority to execute the note, not only for its own benefit, but for others, justifying a recovery.

7. Where the treasurer of a corporation indorsed a note in the name of the corporation, and, after having consulted with the other officers, directors, and stockholders, made a part payment on the note, based on the act of the stockholders, the act of the treasurer in indorsing the note was ratified, and the corporation could not question his authority.

8. The defense that the indorsement of a note by a corporation was for the accommodation of the makers thereof cannot be raised for the first time on appeal.

Appeal from City Court of New York, Trial Term.

Action by the Van Norden Trust Company against L. Rosenberg, Incorporated, and others. From a judgment on the verdict for plaintiff, and from an order denying a new trial, defendant L. Rosenberg, Incorporated, appeals. Affirmed.

Argued before GILDERSLEEVE, P. J., and GIEGERICH and SEABURY, JJ.

Firestone & Silver, for appellant. Parsons, Closson & McIlvaine (Edward C. Sperry and William E. Carnochan, of counsel), for respondent.

GIEGERICH, J. The action is upon a promissory note, dated September 27, 1907, made to their own order by the defendants Lazarus Perelson and Louis Rosenberg, constituting the co-partnership of Perelson & Rosenberg, for the sum of $1,500, payable on demand at the Van Norden Trust Company, No. 420 Grand street, borough of Manhattan.

The complaint alleges that the defendants Perelson and Rosenberg and the defendant L. Rosenberg, Incorporated, a domestic corporation, indorsed and delivered the note in suit to the plaintiff for the purpose of giving credit thereto with the plaintiff, and each with the intent to charge himself or itself as an indorser thereon, and each for value received by him on it; that the plaintiff, upon the credit of such indorsements of the note, gave value therefor, which was received by or inured to the benefit of the defendants, and each of them; and that the plaintiff is the owner and holder of the note in question. The complaint further alleges the payment by the defendants Perelson and Rosenberg of $200 on account of the note, and the application by the plaintiff of the sum of $562.01, then standing on its books to the credit of the defendant corporation, to the payment of the amount then due and owing on the note in controversy.

The individual defendants were, as above shown sued, both as makers and indorsers. The defendant corporation was sued as an indorser, and it alone defended. By its answer the defendant corporation, after admitting that it is a domestic corporation and denying any knowledge or information sufficient to form a belief as to the truth of the other allegations of the complaint, alleges, as a separate defense, the pendency of an action "wherein L. Rosenberg, Incorporated (defendant herein), is the plaintiff, and the Van Norden Trust Company (plaintiff herein) is the defendant," to recover the moneys so on deposit with the plaintiff and applied by it to the credit of said

Digitized by Google

defendant corporation, which moneys the latter alleges are its property, and that the plaintiff refused to repay the same, although duly demanded.

The jury rendered a verdict in favor of the plaintiff, and the defendant corporation, bringing on the appeal taken from the judgment entered thereon, urges, among other grounds for reversal, that the indorsement on the note upon which it is sought to be held liable was not made by it.

The note contains, among other indorsements, that of "Louis Rosenberg, Inc.," and underneath is written the name of the defendant "Louis Rosenberg;" and the defendant corporation urges that since its proper name is "L. Rosenberg, Incorporated," and that since neither the word "treasurer" nor any other name designating the office of the person making the alleged indorsement of the corporation appears, such indorsement is not its corporate indorsement. It is undisputed that, when the indorsement was made, Louis Rosenberg, the person who so wrote the name of the corporation and his own underneath, was the treasurer of the defendant corporation. It also appears from the evidence that at a meeting of the board of directors of the defendant corporation, held on March 27, 1907, the said Louis Rosenberg was elected its treasurer, at which meeting a resolution was adopted:

"That Louis Rosenberg, the treasurer of the company, be and he hereby is instructed and empowered to open and keep an account of deposit and discount with the Van Norden Trust Company, of the city of New York, in the name and for the use of the company, to deposit in the said bank to the credit of this company from time to time any and all moneys, checks, drafts, notes, acceptances, or other evidences of indebtedness (whether belonging to this company or otherwise) which may now be or which may hereafter come into its possession, and in the name of this company to withdraw by checks the same or any part of the proceeds thereof, to pledge the credit of this company as the said treasurer may from time to time find necessary or convenient, and for these and all other purposes to sign, indorse, accept, make, execute, and deliver any and all checks, notes, drafts, and bills of exchange on behalf of the company."

The counsel for the appellant has not referred us to, nor are we aware of, any authority which prescribes any particular form of signature in order to bind a corporation. That the agent who makes the signature need not add his own name after that of the corporation was explicitly said in Youngs v. Perry, 42 App. Div. 247, 59 N. Y. Supp. 19. That such a variation from the correct corporate name as we have in this case would be harmless is, we think, manifest without argument or authority. We have the full name, "Louis," instead of the initial, "L.," and the abbreviation, "Inc.," instead of the complete word, "Incorporated." If the signature was intended to be that of the corporation, the variance is ineffectual to defeat that intention. Indeed, there are cases where it has been held that the signature of a person describing himself as an officer or an agent of a corporation will in fact bind the corporation, if it was so intended. Conant v. American Rubber Tire Co., 48 App. Div. 327, 62 N. Y. Supp. 972, and cases cited.

The form of the indorsement is therefore immaterial, where it is apparent that the company intended to be bound thereby, and es-

Digitized by Google

pecially where, as hereafter shown, the defendant corporation did receive the benefit of the transaction with full knowledge. 10 Cyc. 1027. The plaintiff's manager testified upon the trial that the indorsement in question was added after he had told the defendant corporation's treasurer that he wanted its corporate signature on the note to add additional strength to it. The latter denied that such a conversation was had, and testified that the former told him that he wanted such indorsement just as a matter of form, and that he, the defendant corporation's treasurer, thereupon told him that he had no power to bind the corporation, all of which the plaintiff's manager denied.

Upon the trial the defendant's counsel placed much emphasis upon the claim that the usual signature of the corporation was "L. Rosenberg, Incorporated, by Louis Rosenberg, Treasurer," whereas the indorsement upon the note was "Louis Rosenberg, Inc.," followed by the signature of Louis Rosenberg himself. The trial justice left it to the jury to determine whether the indorsement was made in the manner claimed by the plaintiff. As the jury, by its verdict, found this proposition in the affirmative, they must not only have deemed such discrepancy of no importance, but must as well have given credit to the plaintiff's manager's version of the transaction as against that of the defendant's treasurer. That they were justified by the evidence in so doing there can be no doubt.

It may be well to note, in passing, that the appellant was referred to in the pleadings as "Louis Rosenberg, Inc.," and that counsel on both sides so called it during the trial, and, furthermore, that an order was made "amending all pleadings and proceedings in the above action, by changing the name 'Louis Rosenberg, Inc.,' to 'L. Rosenberg, Incorporated.'"

The appellant further insists that, although the indorsement may be in proper form, its treasurer had no authority to indorse the note sued on. As above shown, the resolution adopted by the defendant corporation on March 28, 1907, among other things, empowered its treasurer to pledge its credit and to sign, indorse, accept, make, execute, and deliver all notes on its behalf.

The plaintiff also proved upon the trial that the note in suit was given on account of an earlier note for $2,000, made by the defendants Perelson and Rosenberg and held by it, and that such note was surrendered after $500 had been paid on account thereof and the note in suit given for the balance. In surrendering the old note, the plaintiff parted with value, and the case is thus brought expressly within the terms of section 52 of the Negotiable Instruments Law (Laws 1897, p. 727, c. 612). This section provides:

"Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time."

It appears from the certificate of incorporation that the defendant corporation was formed for the purpose of acquiring and taking over "as a going concern the business now carried on at 5 Ludlow street, Manhattan, city and State of New York, under the name of L. Rosenberg, and all of the assets and liabilities of the proprietor of that business in connection therewith." Such certificate of incorporation further states that the incorporators were Louis Rosenberg, Herman Herzog, and Max Rosenberg, and it appears from the evidence that they were also the only directors and officers of the corporation, as

Digitized by Google

well as the holders of all its capital stock. It further appears from the evidence that the note of $2,000 was a liability of L. Rosenberg, that Max Rosenberg and Herman Herzog purchased the said business from him, and that they sold it to the corporation. The record does not disclose when such transfers were made, nor the consideration, if any, given therefor. The inference is therefore fairly permissible, from all this evidence, that when Louis Rosenberg indorsed the note in suit he had full authority to bind the defendant corporation. As heretofore shown, he denied that he had such authority; but the facts and circumstances proved upon the trial show that he had.

The appellant urges that the authority so conferred by the resolution of March 28, 1907, was to be exercised only for its benefit. But, even if this were so, the evidence shows that the entire transaction was for the benefit of those who constituted all the officers, directors, and stockholders of the defendant corporation, and, further, that after the note was given a payment of $200 was made by a check of the corporation admittedly given with its authority, and, as Rosenberg testified, "to help out the corporation." The evidence, therefore, not only justified a finding that the indorsement was made for the benefit of the corporation; but such a finding was in fact made by the jury.

The trial justice, at the request of the defendant's counsel, charged the jury:

"That if they should find, from the authorization that Louis Rosenberg 'may pledge the credit of the company as such treasurer may from time to time find it necessary or convenient, and, for these and all other purposes, sign, indorse, accept, make, execute, and deliver any and all checks, notes, drafts, and bills of exchange on behalf of the company' is intended to mean for their benefit, that they must find for the defendant."

It must be presumed from the verdict of the jury that they found that such resolution authorized Louis Rosenberg to pledge the credit of the corporation, not only for its own benefit, but for others. Moreover, the part payment above referred to of $200, made on March 17, 1908, by the treasurer of the defendant corporation after consulting with the other officers, directors, and stockholders, constituted a ratification of the act of Louis Rosenberg in indorsing the note. Such ratification being based upon the act of all its stockholders, the corporation cannot now question. Martin v. N. F. P. Mfg. Co., 122 N. Y. 165, 172, 25 N. E. 303.

The defendant would therefore be estopped, even though such indorsement had been made for the accommodation of the makers of the note; but, as such defense was not pleaded, it cannot be urged for the first time on appeal Archer v. City of Mt. Vernon, 171 N. Y. 639, 63 N. E. 714; Fox v. N. Y. Cent. & H. R. R. R. Co., 95 App. Div. 132, 88 N. Y. Supp. 519.

The judgment should therefore be affirmed, with costs.

GILDERSLEEVE, P. J., concurs in result. SEABURY, J., concurs.

Digitized by Google

Decision No. 1151.

EVANS v. M. C. LILLY & CO.

(Supreme Court of Mississippi. March 8, 1909.)

48 So. 612.

ASSOCIATIONS — INDIVIDUAL LIABILITY OF MEMBERS — APPEAL AND ERROR — HARMLESS ERROR — RULINGS ON PLEADINGS — QUESTIONS FOR REVIEW — PRESENTATION ON MOTION FOR NEW TRIAL.

1. Members of a voluntary association, signing a note given by the association, are individually liable thereon, regardless of their intentions respecting liability or their belief as to the law relating thereto, and even though their signatures were followed by abbreviations indicating their offices in the association.

2. Where the whole course of a trial clearly shows defendant's liability, and that no other result could ever be reached, a judgment against defendant will not be reversed merely because some of defendant's pleas were traversed on immaterial issues.

3. Though a peremptory instruction for plaintiff was given in the absence of defendant's counsel and before opportunity was offered to defendant to present additional proof, the judgment will not be reversed on appeal, where defendant on his motion for a new trial made no showing as to the materiality of the additional evidence which he would have introduced.

Appeal from Circuit Court, Noxubee County; R. F. Cochran, Judge.

Action by M. C. Lilly & Co. against T. J. Evans. From a judgment for plaintiffs, defendant appeals. Affirmed.

Baskin & Wilbourn, for appellant. J. E. Rives and L. Brame, for appellees.

FLETCHER, J. This case, as made by the declaration, pleas, and proof, presents the question of the liability of the members of a voluntary association for an obligation of the association, evidenced by a promissory note signed by the members; the signature being followed by certain abbreviations indicating the offices which they held in the association. That the members signing such a note are individually liable is thoroughly well settled. The case of Lawler v. Murphy, 58 Conn. 294, 20 Atl. 457, 8 L. R. A. 113, is precisely in point. That case holds that the individual members are liable for the contracts of the association, without regard to the question as to what was intended by the members in regard to liability, and despite the fact that the members mistook the law. That case further holds that the addition of the words "secretary," "treasurer," etc., to the signatures, in no way affects the individual liability of the members. This is not an isolated case, but is in harmony with the weight of authority. Lewis v. Tilton, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436; Chick v. Trevett, 20 Me. 462, 37 Am. Dec. 68; Wells v. Gates, 18 Barb. (N. Y.) 554; Hodgson v. Baldwin, 65 Ill. 532. Since the liability of appellant is perfectly clear, we cannot reverse merely because some of the pleas were traversed on immaterial issues, since the whole course of the trial shows that no other result could ever be reached.

Digitized by Google

The point most earnestly pressed upon our attention is that a new trial should have been granted because of the alleged arbitrary action of the court in giving a peremptory instruction for appellee in the absence of counsel, and before opportunity was given to present additional and important proof as to the corporate character of the association. We would unhesitatingly reverse for this reason if appellant on his motion for a new trial had made any satisfactory showing as to the character and effect of the additional evidence. It was claimed that this evidence tended to show that the commandery had been incorporated; but the charter was not produced, nor was there any specific reference to any legislative charter. It was clearly the duty of appellant to produce this evidence, that both the trial court and this court might judge of its competency and effect. There was a total failure to comply with this well-settled rule, and we cannot, therefore, yield to the contention.

Affirmed.

Decision No. 1152.

HACKLEY NAT. BANK OF MUSKEGON v. BARRY et al.

(Supreme Court of Wisconsin. March 9, 1909.)

120 N. W. 275.

BILLS AND NOTES — ACTIONS — WHAT LAW GOVERNS — EVIDENCE — PAROL EVIDENCE — VARYING WRITTEN INSTRUMENT.

1. Where a note was executed in Michigan and sent to Wisconsin for the signature of a person, who signed his name on the back and by direction of the maker sent it to the payee in Michigan, it was a Michigan contract, and the liability of the person who signed his name on the back thereof was governed by the law of that state.

2. Under the Michigan law, the prima facie indication from the fact of a signature of a person not the payee on the back of a note, that he intended to sign as a surety and not as a joint maker, is rebuttable by proof that he signed the note before delivery, rendering him prima facie a joint maker, and evidence of all circumstances surrounding the note's making is then admissible to show the real character of his liability. Held that, where a person not the payee signed a note which was a Michigan contract on the back before delivery, evidence that when he signed it, neither the maker nor the payee being present, he did so with the mental purpose to become an indorser only was inadmissible to rebut his prima facie liability as a joint maker, the evidence tending to vary the terms of the written contract.

Appeal from Circuit Court, Milwaukee County; Warren D. Tarrant, Judge.

Action by the Hackley National Bank of Muskegon against Peter Barry, impleaded with others. There was a directed verdict for defendant Barry, and plaintiff appeals. Reversed and remanded, with directions to render judgment for plaintiff.

Action to recover on a promissory note.

The note sued on was for $10,000. It purported to have been made

Digitized by Google

at Muskegon, Mich., December 15, 1904, by the Chicago & Muskegon Transportation Company, payable four months after date to the order of the Hackley National Bank, at such bank, in Muskegon, with interest at six per cent. per annum. It was signed on the back by defendant Peter Barry.

The complaint stated the facts aforesaid and that the transaction created a Michigan contract; that Barry signed his name on the back before delivery and that by the law of Michigan such signing rendered him liable as a joint maker. Judgment was prayed for accordingly.

Barry, by counsel, answered, among other things, that he was not liable on the note as a joint maker because he signed the same at the city of Milwaukee, Wis., as an indorser only, without receiving value for so doing, and no notice of dishonor of the note was given to him.

It was conceded on the trial that Barry could not be held as an indorser for want of proceedings to charge him with such liability, and that if he was liable at all it was as joint maker.

The evidence was to the effect that the note was sent by the maker or his agent to Barry for his signature; that he signed and by direction of the maker sent the paper to the payee at Muskegon, Mich.

Decisions of the Supreme Court of Michigan, hereafter indicated, were pleaded and offered in evidence, to the effect that, in case of a person, not the payee, signing his name on the back of a promissory note before delivery, for value, by the maker to the payee, the contract of such signer is ambiguous and its real nature is determinable in the light of the circumstances of the transaction, which may be established by parol to aid in construing the paper. In Cook v. Brown, 62 Mich. 473, 29 N. W. 46, 4 Am. St. Rep. 870, the court held as to such an indorsement as the one in question, "resort may be had to parol evidence and to all the circumstances surrounding the transactions of the parties having any bearing upon the subject, to establish the true relations of the parties to the note, and to each other." In Moynahan v. Hanaford, 42 Mich. 329, 3 N. W. 944, the name of a person not the payor of a note appeared on the back thereof, and it was held that, prima facie, he did not intend to sign as a joint maker but rather as a surety; that the ambiguity charged any person, to whom the paper might come with knowledge of the real facts. In Barger v. Farnham, 130 Mich. 487, 90 N. W. 281, such indorsement was held to be irregular and that resort to parol evidence is permissible to determine the nature of the contract. Evidence was allowed showing that Barry, as before indicted, placed his name on the paper before delivery. He was permitted to testify that when he signed at Milwaukee, neither the maker nor the payee being present, he did so with the mental purpose to become an indorser only.

On that state of the case each side moved the court for a verdict and the motion on behalf of the defendant was granted, the one on the part of the plaintiff being denied.

Winkler, Flanders, Bottum & Fawsett, for appellant. McCabe & Dahlman, for respondent.

MARSHALL, J. (after stating the facts as above). It is the opinion of the court that the contract is governed by the law of the

Digitized by Google

State of Michigan. Contrary to the law here, by the decisions of the Supreme Court of such State, the prima facie indication, by the mere fact of the name appearing on the back of the note, was rebutted by proof that it was so signed before delivery. To that extent proof of the circumstances under which the name was signed was admissible. But was the prima facie showing so made, under the Michigan law, that Barry became liable as a joint maker, rebuttable by proof of his mental purpose in signing as he did, not communicated to any one? We fail to find anything in any of the decisions offered in evidence going that far, or anything to that effect in any other decision cited to our attention, or which we have been able to find.

True, the law of Michigan is that such a contract as respondent made is ambiguous and that proof of all circumstances of making it may be given in evidence to enable the court to construe it. The law is that way, generally. There are instances of its having been carried so far, in case of a note of the sort under consideration, as to sanction admission of evidence of what the signer and the person or other parties to the transaction of signing said on the occasion, but there is no instance of the kind in Michigan, so far as we can discover.

Proof of the surrounding circumstances of the making of a contract does not mean proof of what the parties said at the time of such making, much less what a party said or thought, in a purely private way. One is evidence to enable the court to construe the contract. The other is evidence to vary it. The former is admissible on familiar principles. The latter is not upon principles quite as familiar.

This court held in Steele v. Schricker, 55 Wis. 134, 12 N. W. 396, that "Oral conversations had between the parties to a written contract cannot be received as explanatory of the writing. Such conversations do not come within the rule that, 'you may show the facts surrounding the parties at the time, and the situation in which they were placed, in order to interpret the meaning of what they said in their contract.' . . . 'Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it.'"

Our books are replete with statements and applications of that rule. Brittingham & Hixon Lumber Co. v. Manson, 108 Wis. 221, 84 N. W. 183; Blackman v. Arnold, 113 Wis. 487, 89 N. W. 513; Excelsior Wrapper Co. v. Messinger, 116 Wis. 549, 93 N. W. 459; Loree v. Webster Mfg. Co., 134 Wis. 173, 114 N. W. 449. It has been applied in many instances to preclude admission of evidence of what was said between parties to commercial paper, at the time of the making thereof, to vary its terms: as that it might be paid in bank notes (Racine County Bank v. Keep, 13 Wis. 209); or that the note should not be negotiated by the payee (Knox v. Clifford, 38 Wis. 651, 20 Am. Rep. 28); or that a party purporting to be bound as a payee or indorser, should not be so bound (Davy v. Kelley, 66 Wis. 452, 29 N. W. 232); or that the indorser placed his name on the note with the understanding that his indorsement should be without recourse (Eaton v. McMahon, 42 Wis. 484); and many more like instances. The rule is the same in Michigan.

Gumz v. Geigling, 108 Mich. 295, 66 N. W. 48, is quite like this

Digitized by Google

case. Proof was made that the person who placed his name on the back of the paper, he not being the payee, did so before it was delivered, making him by Michigan law a joint maker. He then offered proof that when he signed it was agreed he should not be held liable. The evidence was held inadmissible because it tended to vary the terms of a written contract by parol evidence. The same principle was applied in Phelps v. Abbott, 114 Mich. 88, 72 N. W. 3.

The citations are in harmony with the decisions offered in evidence when it is understood that the right to prove the circumstances characterizing the signing of a note, does not include proof of what the parties to the contract said at or before the time of signing, or what one said or thought in a private way.

It follows that, while respondent would not be held liable on the note if it were a Wisconsin contract, because in that event his liability would be that of an indorser, it being a Michigan contract, he is liable as a joint maker, having signed the paper before delivery; that neither by the laws of Michigan nor the laws of Wisconsin can the apparent obligation respondent assumed by signing as he did, be varied by proof of his mental purpose in the transaction, whether communicated to other parties to the note or not. So the motion for a verdict in plaintiff's favor should have been granted.

The judgment is reversed and the cause remanded, with directions to render judgment in plaintiff's favor as prayed for in the complaint.

WINSLOW, C. J., took no part.

Decision No. 1153.

NORWOOD et al. v. LEEVES.

(Court of Civil Appeals of Texas. Nov. 12, 1908. Rehearing Denied Jan. 7, 1909.)

115 S. W. 53.

TENANCY IN COMMON — LIABILITIES OF CO-TENANTS AS TO THIRD PERSONS — CREDITORS — BILLS AND NOTES — MATURITY — TRANSFER AFTER MATURITY.

1. J. and L. owned a sawmill plant and timber and operated the same as partners. L. sold his half interest in the property to N., who gave a note for the price secured by a mortgage on his interest. J. and N. operated the plant as partners under an instrument executed the day following L.'s sale, whereby J. acted as manager of the business. Held, that since J. and N. not only contemplated that the operation of the plant should continue, and that in its operation timber should be manufactured, but also contemplated that liens under Sayles' Ann. Civ. Stat. 1897, arts 3339a–3339f, for wages of operators, might be created against the property covered by the mortgage, a third person acquiring the note after maturity could not restrain the operation of the plant and the sale of lumber, in the absence of evidence of the insolvency of J. or N. or that the property mortgaged would be removed beyond the jurisdiction of the court or incumbered by other liens so as to make foreclosure of the mortgage ineffective.

2. A note payable in instalments, several of which are past due and unpaid, is

Digitized by Google

overdue, and a buyer thereof holds it as provided by Sayles' Ann. Civ. Stat. 1897, art. 307, subject to equities available against the payee.

Appeal from District Court, Upshur County; R. W. Simpson, Judge.

Action by T. H. Leeves against B. D. Norwood and another. From a restraining order made in vacation, defendants appeal. Reversed, and injunction dissolved.

The appeal is prosecuted by appellants Norwood and J. B. Newby, under the provisions of the Act of April 16, 1907 (Gen. Laws, p. 206, c. 107), from an order made in vacation by the judge of the Seventh Judicial District enjoining said appellants from in any way incumbering, etc., the interest owned by Norwood in certain timber, lumber, and a sawmill plant jointly owned by him and said Newby.

In his petition Leeves, appellee, alleged: That he was the owner and holder of promissory notes dated July 5, 1907, aggregating something over $6,000, executed by Norwood in favor of said Newby and secured by a chattel mortgage on Norwood's undivided one-half interest in the mill plant, timber and lumber manufactured therefrom, at the same time executed by Norwood; that the debt evidenced by the notes and mortgage was due; that the notes were executed by Norwood to cover the purchase price of an undivided one-half interest in the property referred to, bought by Norwood of said Newby; that after the purchase by Norwood the sawmill was operated by him and said Newby; that in the operation of the mill they manufactured out of the timber covered by the mortgage a large quantity of lumber, to which the lien of the mortgage attached; that appellee purchased said notes of said Newby; that at the time he so purchased the notes there was on the millyard, subject to the lien of said mortgage, between 600,000 and 700,000 feet of lumber; that after appellee purchased the notes, to wit, July 9, 1908, Norwood abandoned the mill, leaving the operation thereof entirely to said Newby; that said Newby, thereafterwards, had disposed of about 400,000 feet of the lumber referred to, and was disposing of the remainder as fast as he could, and had refused to account to appellee for any part of the proceeds thereof, but instead was asserting a right in himself to all such proceeds; that the proceeds of lumber manufactured from the timber covered by the mortgage was in danger of being lost to plaintiff; that he was induced to purchase the notes by Norwood and said Newby's representations to him that there was no indebtedness, except a sum not exceeding $700 due to L. B. Newby by said Norwood and said J. B. Newby as partners in the mill business; that, at the time appellee applied for the relief granted, said J. B. Newby was claiming a large indebtedness in his favor against the firm of Norwood & Newby, and that same was entitled to payment out of the property mortgaged to secure appellee's debt before appellee's debt should be paid; that, while he could not state the exact amount of the indebtedness so claimed by said J. B. Newby, it was in an amount sufficient to absorb in its payment all said property; that said indebtedness so claimed by said J. B. Newby in his favor was fictitious and fraudulent, and the claim therefor was made for the purpose of cheating and defrauding appellee out of the security for his debt; that, if appellee should be mistaken in his charge that said indebtedness claimed by said J. B. Newby was

Digitized by Google

fictitious, nevertheless, the representations made to him as to the amount of indebtedness owing by said Norwood and Newby as partners at the time he purchased said notes was fraudulently made to induce him to purchase said notes, and appellants should be held estopped from asserting a liability on account thereof as against the property mortgaged to secure his notes; that said J. B. Newby was in the sole possession of the property mortgaged to secure said notes, and was applying the proceeds of such property to pay the fictitious claims asserted by him; that, if said J. B. Newby should be permitted to retain the possession of said property, appellee would be irreparably injured; and that said Norwood and said J. B. Newby had made the representations and were acting together in relation to the mortgaged property in pursuance of a conspiracy between them to cheat and defraud appellee. It was further alleged in appellee's petition: That on July 5, 1908, Norwood in writing contracted and agreed on or before September 10, 1908, to deliver to appellee on board cars at Smith for credit on one of the notes, 100,000 feet of lumber of the value, appellee alleged, of $1,400; that said J. B. Newby, in writing, guaranteed the performance by said Norwood of said undertaking; and that no part of said lumber had been delivered as agreed upon. The prayer was for the debt evidenced by the notes, for a foreclosure of the mortgage made to secure same, "for full accounting of all lumber sold as well as partnership accounts between said Newby and Norwood," for the appointment of a receiver to take "immediate possession and charge of said property, and, in case the court should not appoint a receiver, then that the said defendants and each of them be enjoined from incumbering, selling, or in any manner disposing of the one-half interest in said property of the said Norwood," and for such other orders as might be necessary to preserve and protect appellee in his rights as the owner of the notes, secured as aforesaid.

Appellants answered by exceptions to the petition, a general denial, and specially, so far as need be stated, as follows: That at the time Norwood purchased the one-half interest in the property referred to, it was owned by J. B. Newby and L. B. Newby, but in the name of the former; that the one-half interest purchased by Norwood was the interest owned by L. B. Newby, and the notes executed therefor by Norwood, while made to J. B. Newby, were in fact the property of L. B. Newby, by whom they were sold to appellee; that at the time of the sale of the notes to appellee, the firm of Newby & Norwood, composed of J. B. Newby and Norwood, was indebted to said J. B. Newby for money, labor, and on other accounts in the sum of about $4,277.67, and to other persons in the sum of about $900, which said J. B. Newby assumed and afterwards paid off; that on September 21, 1908, the firm of Newby & Norwood was indebted to said J. B. Newby in the sum, approximately, of $5,300; that on the day last mentioned said firm, with the consent and acquiescence of both its members, sold and delivered to said J. B. Newby, to be applied as a credit on said indebtedness due to him, lumber manufactured by said firm of the value of $2,010.98, leaving, after crediting said lumber against said indebtedness, about the sum of $3,200 still due said J. B. Newby by said firm; and that besides the balance due by said firm to said J. B. Newby it was indebted to various other parties named in sums aggregating between $600 and $700. Appel-

Digitized by Google

lants specially denied that they had otherwise than in due course of trade disposed of any other of the partnership property between them, that they had made the representations charged in regard to the indebtedness due on account of the mill business at the time appellee purchased the notes, and the charge of a conspiracy between them.

From the testimony admitted by the judge at the hearing it appeared: That J. B. Newby and his son L. B. Newby together owned a sawmill plant, including certain logging wagons and oxen and the saw timber on several tracts of land, and as partners operated same in the name of J. B. Newby; that on July 5, 1907, L. B. Newby sold his undivided one-half interest in the property, and through J. B. Newby, in whose name the title stood, conveyed same to Norwood, receiving therefor the notes sued upon, on their face payable to J. B. Newby; that at the same time he executed the notes, to secure them Norwood executed the mortgage sought to be foreclosed, whereby he conveyed the property purchased by him to J. B. Newby; and that Norwood and J. B. Newby, as partners, continued the operation of the mill, and on July 6, 1907, by an instrument in writing executed by them, agreed that J. B. Newby should act as manager of the business and as such should receive a salary of $200 per month for two years, and that Norwood should receive for service he was to perform in operating the mill the profits on a commissary run in connection with it. It further appeared from the testimony of J. B. Newby and Norwood: That it was understood between them that the former was to furnish the commissary and money needed to operate the mill; that he did so, and in this way, and on account of his salary as manager, J. B. Newby claimed the business was indebted to him at the time (in July, 1908) appellee acquired the notes in sums aggregating "something like $5,000 or $6,000." On September 21, 1908, lumber manufactured out of the timber referred to, aggregating in value $2,010.98, and being all there was then on hand, was transferred by the firm of Newby & Norwood to J. B. Newby as a payment on the debt due to him by the firm, leaving then due to him by the firm, according to his contention, about $3,300. The transfer, it appeared, was made for the avowed purpose of giving the debt claimed by J. B. Newby preference over the debt due appellee. At the time of the hearing, the firm of Newby & Norwood, J. B. Newby testified, in addition to the sum due to him, was indebted to other parties in sums aggregating between $500 and $600. One Wiley, who as agent for appellee, represented him in the purchase of the notes of L. B. Newby, testified: That before the purchase was consummated Norwood represented to him that the indebtedness of Newby and Norwood to J. B. Newby was not more than $600 or 6700; that L. B. Newby stated to him that the indebtedness of the firm to J. B. Newby "did not amount to much;" that after he had purchased the notes for appellee, J. B. Newby stated to him that the firm did not them owe him (J. B. Newby) over $1,000; that he would not have purchased the notes for appellee had he known that the firm's indebtedness to J. B. Newby was then as much as $5,200, as said J. B. Newby afterwards claimed it to be. Wiley further testified: That at the time he purchased the notes for appellee there was about 600,000 feet of lumber on the millyard, and that the firm, since the purchase by appellee of the notes, had disposed of about 400,000 feet of the

Digitized by Google

lumber; that nothing had been paid on the notes; and that Norwood had left the mill and gone to work elsewhere for wages.

On the allegations in the petition, the judge in vacation made an order restraining, until further action by him, appellants from selling or otherwise disposing of any of the property described in the petition, and set down the matter for a hearing on its merits to a day named in the order. It was then heard on the petition, appellants' answer, which had in the meantime been filed, and the evidence offered by the parties, after appellants' exceptions to the petition had been overruled. Whereupon the judge made an order enjoining appellants from in any manner incumbering or disposing of Norwood's one-half interest in the property, mortgaged to secure the payment of the notes, or of his one-half interest in any of the partnership property owned by Norwood and J. B. Newby as partners; from disposing of more than one-half of the lumber manufactured, except so far as he might thereafterwards upon application made to him in chambers authorize it from time to time; from in any manner incumbering, or permitting to be incumbered, by labor liens, or otherwise, said Norwood's interest in lumber thereafterwards manufactured by said Newby & Norwood; from buying any machinery for partnership account, except as he might on application made to him authorize to be purchased; and from creating any kind of partnership debt, except for the actual running expenses of said sawmill. Further, the order required appellants to keep an account of the expenditures incurred in the operation of the mill, of the amount of lumber manufactured, and of such lumber as might be sold or otherwise disposed of, and make a full report to the judge at the next regular term of his court in Upshur county of the transactions of the sawmill business. As explanatory of the order made, its object was declared to be to require all the expenses of operating the mill to be paid out of Newby's one-half interest in the lumber manufactured, and to prevent the creation of any incumbrances or liens on Norwood's one-half interest therein for operating expenses or other debts, except so far as might thereafterwards be authorized by the judge.

Sam D. Snodgrass, for appellants. Warren & Briggs, for appellee.

WILLSON, C. J. (after stating the facts as above). The property mortgaged to secure the debt in appellee's favor was Norwood's undivided one-half interest in a sawmill plant and the timber on a number of tracts of land, alleged, in appellee's petition, to have been situated adjacent to the mill plant. While there are such general allegations in the petition as that Newby was "proceeding to apply the proceeds of said property to the payment" of the indebtedness claimed by him against the firm of Newby & Norwood, and that the property was "in danger of being lost" to appellee, we do not understand that it was contended that any of the machinery, tools, wagons, oxen, etc., forming the sawmill plant, really had been or was likely to be wrongfully disposed of by appellants. Nor do we understand that it was contended that any portion of such machinery, etc., had been or would likely be further incumbered by appellants by liens, other than statutory ones for wages which might arise in favor of employees performing service in the operation of the mill. But we do understand that appellee contended that there

Digitized by Google

was a large quantity of lumber on the millyard at the time he became the owner of the debt secured by the mortgage, that by its terms the mortgage was a lien on this lumber, and that appellants, in pursuance of a conspiracy between them to cheat and defraud him, had wrongfully sold part of said lumber and applied the proceeds of such sale to the payment of an indebtedness claimed in favor of one of them against the other as partners, and were threatening to sell the remainder of said lumber and misapply the proceeds arising from such sale. In so far as the contention was that appellants were threatening to sell and misapply a balance remaining of the lumber, it was not, it seems, supported by the evidence at the hearing. J. B. Newby testified, and his testimony was not contradicted on the point, that all the lumber on the yard at the time appellee purchased the notes had been transferred by the firm to him (Newby) as a payment on the debt he claimed against it. It is clear that the fact that appellants may have wrongfully disposed of the lumber, and wrongfully applied the proceeds thereof, did not entitle appellee to the relief granted to him. "The appropriate function of the writ of injunction," says Mr. High, "is to afford preventive relief only, and not to correct injuries which have already been committed, or to restore parties to rights of which they have already been deprived. . . . If the act sought to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act." 1 High on Injunctions, § 23.

There being, in our opinion, an absence of any other matter alleged in the petition which might furnish grounds for relief by an injunction, we might rest our conclusion that the writ was improvidently granted on the failure of the evidence to show the injury to be threatened as alleged; but we are of the opinion that, if it had been shown that J. B. Newby was about to dispose of lumber manufactured in the operation of the mill, the injunction should not have been granted. The record shows that the mill and timber were jointly owned by J. B. Newby and L. B. Newby, and that as partners, under the name of J. B. Newby, they were operating the mill at the time L. B. Newby sold his interest in the property to Norwood. It further sufficiently appears, we think, that the timber was regarded by the parties at the time of the sale to Norwood as forming a part of the mill property. It evidently was contemplated between them that the operation of the mill should be continued by Norwood and J. B. Newby, and that in its operation the timber should be manufactured into lumber. If it was so contemplated, then the parties must have further contemplated that liens for wages of operatives might be created against property covered by the mortgage, so as to be entitled to precedence over the lien of the mortgage, for it could hardly have been contemplated that the mill might be operated without the creation of such liens. Sayles' Ann. Civ. St. 1897, arts. 3339a to 3339f. Such an understanding between the parties, we think, would have created equities in favor of Norwood deserving careful weighing as against any which might have been urged by L. B. Newby had he, as the holder of the notes, sought relief by injunction to restrain the operation of the mill, the use of the timber in the manufacture of lumber, and the creation of liens against the property — and equities so arising would not deserve

Digitized by Google

less consideration when appellee, as said L. B. Newby's assignee, sought such relief. The notes were payable in instalments, several of which were long past due and unpaid at the time appellee became the owner of the paper. He therefore stood in the position of a purchaser of the notes after their maturity. Harrington v. Claflin, 91 Tex. 294, 42 S. W. 1055. As such a purchaser, he held them subject in his hands to equities which might have been urged to them while they were in the hands of L. B. Newby. Sayles' Ann. Civ. St. 1907, art. 307. When asking an injunction restraining the operation of the mill, the sale of the timber manufactured from the timber mortgaged, and the creation of incumbrances on the property, in the face of such an understanding between the parties to the mortgage, he should, we think, be held to be bound to show not only equities entitling him to the relief sought, but also strong enough to overcome equities in favor of Norwood entitling him to have such relief denied. Considering the allegations in the petition in connection with the evidence offered on the hearing, we are inclined to think such a showing was not made by appellee. It was not alleged that either Norwood or J. B. Newby was insolvent. It was not alleged that the mortgaged property, if disposed of, would be moved beyond the jurisdiction of the court, or that it would be so incumbered with other than labor liens as to make foreclosure proceedings ineffective. While the absence of such allegations, perhaps, might not in every case be held to be a reason for denying relief by injunction (Sumner v. Crawford, 91 Tex. 130, 41 S. W. 994), in a case like this we think their absence should be held a sufficient reason for denying the relief.

There is yet another reason why we think the relief granted should have been denied. At the time the mortgage was executed by Norwood, as before stated, he and J. B. Newby jointly owned the property. Each equally with the other had the right to use and enjoy it in a reasonable way and to the extent of his interest in it. Neither had a right in any way to impair or interfere with the other in the exercise of his equal right. It may, we think, be assumed that the value of the mill plant, consisting as it did of machinery, tools, wagons, oxen, etc., and the timber, depended largely upon the inability of its owners to operate it. The right to use and enjoy it in a reasonable way, we think, entitled each of the joint owners to operate it. It was owned for that purpose. Its value to its owners necessarily would be seriously impaired if they should be denied the right to operate it. The value of each owner's share to him likewise would be impaired, should he be denied the right to operate or have it operated. If either desired the operation of the mill discontinued, his remedy as against the other, who might not wish its operation discontinued, would be to have a partition effected. In no other way now occurring to us could one joint owner of such property, so long as he recognized and respected the equal right of his co-owner, be prevented from making such use of the property. Each of such co-owners, of course, would have the right to incumber his interest in the common property; but a creditor of one of them, as the holder of such incumbrance, would not thereby acquire as against the other co-owner other rights than those possessed by his debtor. Such creditor would take and hold his security subject to the right existing in the other part owner to use and enjoy the

Digitized by Google

property in a reasonable way and to the extent of his interest in it. So long as the other owner was using the property only for the purposes for which it was held, and by such use was not securing to himself a greater share thereof than he was entitled to, the creditor, like the owner of the interest to which the incumbrance attached, would not have a right to have the other part owner restrained from so using the common property. There was no allegation in the petition that, in the operation of the mill and disposition made or threatened to be made of the lumber, J. B. Newby had obtained, or would obtain, a greater share of the timber than he was or would be entitled to. It seems to us some such showing should have been made before relief to appellee operating, necessarily, it would seem, to close down the mill, should have been granted, for, while J. B. Newby was not enjoined directly from operating the mill, the effect of the injunction would be to restrain him from operating it. He was directed not to incumber by labor liens, or otherwise, Norwood's one-half interest in the property mortgaged, and not to dispose of more than one-half of the lumber manufactured, or which might be manufactured, in the operation of the mill, except as he might thereafterwards be otherwise authorized to do by the judge. The evidence showed that it required the services of about twenty-five laborers to operate the mill. In favor of each of these, the law created, as the services were performed, a lien for his wages. Sayles' Ann. Civ. St. 1897, arts. 3339a to 3339f. Perhaps the only way in which the mill could be operated without creating liens against the property would be to be careful to pay such laborers for their services in advance of the performance of such service. Such a course, perhaps, would not be practicable, and therefore we think a proper observance by Newby of the judge's order would have necessitated the closing down of the mill. We do not think relief to appellee, with such consequences to J. B. Newby, should have been granted on the showing made. If it was not necessary that it should have been made to appear that said J. B. Newby was insolvent, so that a recovery against him for waste or for disposing of more than his share of the common property could be enforced, we think it should have been made to appear that he had disposed of, or was about to dispose of, more than his share of the property. That in such a case such a showing should be made seems to have been the view taken by the Supreme Court of California in Hihn v. Peck, 18 Cal. 640, where it is said that: "The defendants, being tenants in common, had a right to cut timber and use or dispose of it, at least to an extent corresponding to their share of the estate. No insolvency is averred; nor that they are exceeding their share." Hihn v. Peck, 18 Cal. 644. And see McCord v. Oakland Q. M. Co., 64 Cal. 143, 27 Pac. 863, 49 Am. St. Rep. 686; Gillum v. Ry. Co., 5 Tex. Civ. App. 338, 23 S. W. 717; Trammell v. McDade, 29 Tex. 366; 1 High on Injunctions, § 692.

For the reasons stated, the order of the judge granting the injunction is reversed, and the injunction is dissolved.

Digitized by Google

Decision No. 1154.

BLANCHARD v. BLANCHARD.

(Supreme Court, Special Term, Chautauqua County. Dec. 22, 1908.)

113 N. Y. Supp. 882.

BILLS AND NOTES — ACCOMMODATION INDORSEMENT — MAKER'S LIABILITY — LIMITATION OF ACTIONS — REIMBURSEMENT OF SURETY — ACCRUAL OF RIGHT OF ACTION — MONEY PAID — LIMITATION APPLICABLE — PRINCIPAL AND SURETY — REIMBURSEMENT — OBLIGATION IMPLIED — PAYMENT BY SURETY — REQUEST PRESUMED — GUARANTY — PAYMENT BY GUARANTOR — MONEY PAID — RIGHT TO SUE.

1. While the maker of a note is impliedly bound to reimburse one indorsing it for his accommodation for any payment the indorser may be compelled to make, he cannot sue the maker until he has made the payment.

2. Limitations on an action by a surety against the principal for reimbursement run, not from the time when the debt was due, but from the time when the surety paid it.

3. An action by an accommodation indorser against the maker of a note for payments thereon for the maker's benefit, brought within six years from the making of any of the payments, is brought in time.

4. A principal is impliedly bound to indemnify his surety for payments made as surety.

5. A payment by a surety on the principal's account is presumed to be made at the principal's request.

6. A payment by a guarantor on the principal's account is presumed to be made at the principal's request.

7. An accommodation indorser of a note, who has been compelled to make payment thereon, can maintain an action against the maker for money paid to his use.

Action by Esther F. Blanchard, administratrix of Flint Blanchard, deceased, against Amos F. Blanchard. Judgment for plaintiff.

A. Frank Jenks, for plaintiff. John G. Wicks and Vernon E. Peckham, for defendant.

WHEELER, J. This case is submitted to the court for decision upon stipulated facts, which are substantially as follows:

The principal facts are: That on or about the 12th day of May, 1900, at Jamestown, N. Y., the defendant made his certain promissory note in writing, whereby, in three months after said date, he promised to pay to the order of Flint Blanchard, at Chautauqua County Trust Company, of Jamestown, N. Y., the sum of $1,100.15. That the said note thus made was indorsed by the said Flint Blanchard by writing his name on the back thereof, and delivered to one Daniel Griswold, who then became the owner and holder thereof, and that the said Griswold advanced to the said defendant the said sum of $1,100.15 on account of said note. That the indorsement of the said Flint Blanchard was wholly for the accommodation of said defendant, Amos F. Blanchard. That on or about the 9th day of July, 1900, the said

Digitized by Google

Flint Blanchard made and executed an indorsement on the back of said note in the words and figures following:

"I hereby waive demand of payment and notice of non-payment, and guarantee the payment of this note.

"Jamestown, N. Y., 7/9/1900."

That when said note became due and payable, to wit, on the 12th day of August, 1900, it was presented for payment at the place where the same was payable, and payment thereof duly demanded, which was refused, and that the defendant has ever since refused to pay the said note, or any interest thereon, or any part thereof. That before making any payment on said note said Flint Blanchard requested said Danied Griswold to write to the said defendant, asking him to pay said note or some part thereof, and that said Daniel Griswold did write to said defendant, asking him to make a payment on said note; but that said defendant never answered said letter, nor did he ever make a payment on said note. That on or about the 2d day of June, 1904, the said Flint Blanchard paid on said note the sum of $367.98, and the same was indorsed upon said note by the said Daniel Griswold. That on or about the 19th day of July, 1905, the said Flint Blanchard paid to said Daniel Griswold on said note the sum of $60, and that said payment was indorsed on said note. That said Flint Blanchard died intestate on or about the 17th day of February, 1906, and that this plaintiff was thereafter duly appointed administratrix of the goods, chattels, and credits of said Flint Blanchard, deceased, and that letters of administration were duly issued to her. That on the 19th day of February, 1907, the said administratrix, on demand of said Griswold, paid the balance of said note then due and unpaid, in full satisfaction of the liability of said Flint Blanchard upon said note.

The complaint bases the action, not upon the note in question, but for money paid, laid out, and expended for the use and benefit of the defendant by reason of the liability created by the indorsement of the note in question. The defendant contends that, inasmuch as the note itself was outlawed and could not have been enforced by the holder against the maker, this action cannot be maintained in favor of the indorser, who made payments thereon. On the other hand, the plaintiff contends that the action is not one based on the note itself, but for moneys paid and advanced for the defendant's use and accommodation, and that the cause or causes of action for such payment accrued within six years from the time this action was begun, and therefore the statute of limitations constitutes no defense.

We are of the opinion that the plaintiff's contention is correct. When the plaintiff's intestate indorsed the note in question for the accommodation of the defendant, the law implied a contract between them that the maker would reimburse the indorser for any moneys he might be compelled to pay by reason of such indorsement. But the indorser could maintain no action against the maker until he had in fact made payment on the note by reason of his liability as indorser. As against a principal debtor, by a surety who has paid the debt, the statute of limitations runs, not from the time when the debt was due, but from the time when the surety paid it. Thayer v. Daniels, 110 Mass. 345; Appleton v. Bascom, 3 Metc. (Mass.) 169; Hall v. Thayer, 12 Metc. (Mass.) 130; Am. & Eng. Encyc. of Law, vol. 27, p. 481, and cases cited.

Digitized by Google

This action was brought October 8, 1907, and therefore was begun before the expiration of six years from the making of any of the payments by the plaintiff or her intestate upon the note in question. It follows that the statute of limitations constitutes no defense in this action, provided the action can be maintained for moneys paid and expended for the use and benefit of the defendant. That this may be done we think is fundamental. The law implies a promise on the part of the principal to indemnify the surety, and to pay him all the money he might be compelled, in consequence of his liability as surety, to pay the creditor. Thayer v. Daniels, 110 Mass. 346; Konitzy v. Meyer, 49 N. Y. 572; Stearns on Suretyship, § 296. It is the rule that a payment by a surety or guarantor for the account of a principal is presumed to be at the request of the latter, which raises an implied promise of reimbursement. Stearns on Suretyship, § 296.

The action in this case is, in form, based on the implied promise, and it is maintainable upon the plainest elementary principles. The right of recovery has been upheld in a number of well-considered cases.

In the case of Butler v. Wright, 20 Johns. 367, the defendant, being the payee of a promissory note for $1,500, indorsed it to the plaintiff, who in turn indorsed and delivered it to a bank. The note was protested for non-payment, and the plaintiff afterwards paid $800 in part, and promised to pay the balance. The bank subsequently sued the plaintiff and recovered judgment for the unpaid balance due on the note. The plaintiff afterwards paid $380 to the bank. The balance of the note was unpaid, and the bank continued to hold the note. The plaintiff brought an action, and declared against the defendant as indorser of the note in the usual form, and also for money paid for the defendant. It was held that, though the plaintiff could not maintain an action on the note, as it was not fully paid and was still held by the bank, he might maintain an action against the defendant on the count for money paid, laid out, and expended for the defendant at his request.

In the case of Norton v. Hall, 41 Vt. 471, the plaintiff was an accommodation indorser upon a promissory note. When the note fell due, the plaintiff being unable to pay it, the bank holding it demanded additional security, which the plaintiff gave, which the bank held until the plaintiff finally paid the note, which was more than six years after it became due. The court held that, the maker having failed to pay the note when due, the plaintiff had the right to make the arrangement with the bank, and that the maker could not avail himself of the statute of limitations as a defense to a suit by the plaintiff against him, brought within six years from the time the plaintiff paid the note. The court held that the plaintiff's right of action at law as surety for the defendant accrued on the payment of the note to the bank, citing Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582; Baker v. Marshall, 16 Vt. 522, 42 Am. Dec. 528.

The defendant's counsel rely on the reported case of Woodruff v. Moore, 8 Barb. 171. That case, however, is to be distinguished from the one now under consideration. In that case an indorser and payee of a note, having paid the same, declared and sought to recover upon the note itself, and did not sue for moneys paid and expended. It was held no recovery could be had, because the instrument itself had been outlawed. A different result would have undoubtedly been

Digitized by Google

reached, had a timely action been brought for moneys paid and expended for the defendant's benefit.

For these reasons, we conclude the plaintiff is entitled to recover.

Judgment directed accordingly.

Decision No. 1155.

BLAKE v. HAMILTON DIME SAVINGS BANK CO.

(Supreme Court of Ohio. December 22, 1908.)

87 N. E. 73

BANKS AND BANKING — CERTIFICATION OF CHECK — EFFECT — CERTIFIED CHECK — LIABILITY — DEPOSIT OF CERTIFIED CHECK — BONA FIDE HOLDER.

1. The certificate by a bank that a check is good is equivalent to acceptance, and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment.

2. The transfer of a certified check is an assignment of money to meet it, and the bank making the certification is liable therefor to the holder.

3. The object of certifying a check is to enable a holder to use it as money. The drawer or indorser of a certified check cannot, after its delivery, revoke it or stop payment upon it by notice to the drawee not to pay, and a bank that has received a certified check for deposit and has credited the depositor with the amount of it is a bona fide holder and may enforce payment of it, notwithstanding it may, before payment to the depositor, have received notice that the check was fraudulently obtained by the depositor.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by the Hamilton Dime Savings Bank Company against the Franklin Bank. Judgment for plaintiff was affirmed by the Circuit Court, and defendant brings error. Affirmed.

Burch & Johnson, for plaintiff in error. Pogue & Pogue and Murphy & Williams, for defendants in error.

SUMMERS, J. The action was brought by the defendant in error, the Hamilton Dime Savings Bank Company, of Hamilton, Ohio, against the Franklin Bank of Cincinnati, Ohio, upon a check drawn by C. G. Blake & Co. upon the Franklin Bank for $275, payable to the order of C. G. Blake, and certified by the Franklin Bank to be good, and indorsed by C. G. Blake and Charles Werbel.

On Friday, October 16, 1903, Blake bought a horse from Werbel and indorsed the check to the order of Werbel and delivered it to him in payment for the horse. The indorsement of certification was as follows: "Good for $275.00 when properly indorsed. The Franklin Bank, H. Sachteleben, Teller." Werbel indorsed the check, and on the following Monday, October the 20th, deposited it to his account with the Hamilton Dime Savings Bank Company, and was given

Digitized by Google

credit therefor on the books of the bank. The Hamilton Dime Savings Bank Company sent the check to the Atlas National Bank, of Cincinnati, for collection, and it was protested for non-payment for the reason "payment stopped." Thereupon, on November 19, 1903, the defendant in error sued the Franklin Bank on the check, and the Franklin Bank, under section 5016, Rev. St. 1908, filed a motion for an order of interpleader, which was granted, the amount of the check with interest was paid into court, and C. G. Blake was substituted as defendant. Blake filed an answer averring that he had been induced to purchase the horse and to deliver the check in payment therefor by the false and fraudulent representations of Werbel, that Werbel is the owner of the check, that the plaintiff, The Hamilton Dime Savings Bank Company, received the check only as collecting agent for Werbel and with knowledge that Werbel had been notified that payment on the check would be stopped. A jury was waived, and the court stated its findings of fact separately from its conclusions of law. Judgment was given for the bank for the amount paid into court, less costs to the date of that payment. The court found that the Hamilton Dime Savings Bank Company was the purchaser of the check for value and before notice and without knowledge of Blake's claim. On error the Circuit Court affirmed the judgment, not, however, on the ground that the bank was entitled to the protection afforded to bona fide purchasers; the court stating in its opinion, as a matter of law, that the savings bank was not a purchaser for value, but that the transaction was the ordinary and usual one of a deposit by a depositor, and not a purchase of the check for value by the bank. At the time the bank received notice of the claim of Blake, it had on deposit to the credit of Werbel a sum in excess of the amount of the check. No question is made as to the authority of the teller of the bank to bind the bank by the certification of the check. The Circuit Court affirmed the judgment on the ground that: "Werbel became the absolute owner of the check free from the claim of Blake to the same extent as if it had been money. 2 Daniel on Negotiable Instruments, § 1601; Morse on Banks and Banking, § 414."

The Circuit Court was right in its opinion that the Hamilton Bank was not a purchaser of the check. In the absence of special agreement, the deposit in bank to his credit of an uncertified check by the holder, whether drawn on that bank or another, is deemed to be for collection and not for payment, and if there be no funds to meet it, or if it be returned dishonored, the deposit bank may return it to the depositor and cancel the credit. Daniel on Negotiable Instruments, § 1623; Morse on Banks & Banking, 320, 321; National Gold Bank & Trust Co. v. McDonald, 51 Cal. 64, 21 Am. Rep. 697. And in such case, if the bank receives notice of the invalidity of the check, it cannot become a bona fide holder by subsequent payment. "The mere discounting of paper and placing the amount thereof to the credit of a depositor, who already has a large balance to his credit, does not make the bank a purchaser for value so as to protect it against infirmities in the paper. Entering the amount of the discount to the credit of the depositor simply creates the relation between the bank and the depositor of debtor and creditor, and so long as that relation remains, and the deposit is not drawn out, the bank has simply promised to pay the depositor, has parted with no value, and is not entitled to the protection of a bona fide holder of paper." Mann v.

Digitized by Google

National Bank, 30 Kan. 412, 1 Pac. 579. "The mere credit of a check upon the books of a bank, which may be canceled at any time, does not make the bank the bona fide purchaser for value. If after such credit, and before payment for value, upon the faith thereof, the holder receives notice of the invalidity of the check, he cannot become a bona fide holder by subsequent payment." Daniel, Negotiable Instruments (5th ed.), § 1652; Central National Bank v. Valentine, 18 Hun (N. Y.) 417; Manufacturers' National Bank v. Newell, 71 Wis. 309, 37 N. W. 420. The Hamilton Bank therefore, upon the evidence, was not a purchaser of the check, or entitled to the protection of a bona fide holder of the paper, unless it is so entitled by reason of the fact that the check was certified.

In this State a bank check for part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn (Covert v. Rhodes, 48 Ohio St. 66, 27 N. E. 94) and the holder cannot maintain an action against the bank for the amount of the check, although it has funds to the credit of the drawer sufficient to meet it. C. H. & D. R. R. Co. v. Bank, 54 Ohio St. 60, 42 N. E. 700, 31 L. R. A. 653, 56 Am. St. Rep. 700. This is now made the law by statute. Section 3177v, Rev. St. 1908, provides: "A check is a bill of exchange drawn on a bank payable on demand." And section 3177z is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

But this is a certified check. Mr. Daniel says (section 1602) that the certification of checks is an expedient and outgrowth of modern commerce quite recent in its origin, but now of daily and extensive occurrence. And in Merchants' National Bank of Boston v. State National Bank of Boston, 10 Wall. 604, 19 L. Ed. 1008, decided in 1871, Mr. Justice Swayne says in the opinion that "it is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than $100,000,000," and that "we could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity." And, speaking of their legal effect, he says: "By the law merchant of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment. It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion. A bank incurs no

Digitized by Google

greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in 'certified check account,' and, when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process. The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money." Daniel (section 1603) says that, when the check is certified, the bank becomes at once the principal debtor, and that, when the holder procures the bank to certify the check "in contemplation and by operation of law, it is the same as if the funds had been actually paid out by the bank to the holder, by him redeposited to his own credit, and a certificate of deposit issued to him therefor. In other words, a certified check is a shorthand certificate of deposit in favor of the holder, and payable to him, or to him or order, or to bearer, according to its terms." Again, he says: "It will be too late after the bank has certified the check for the drawer to revoke it, and the bank will be bound to pay it though notified by the drawer not to do so." And, again, he says, in section 1605, that "the check when certified circulates as the representative of so much cash in bank, payable, whenever demanded, to the holder. It is then like cash, but still it is not the same as cash, for 'nullus simile est idem.'"

The drawer by delivery of a certified check in the absence of special agreement, is not discharged from liability, the only effect of the certification being to add the credit of the bank to that of the drawer (Daniel on Negotiable Instruments, § 1626; Oyster & Fish Co. v. Bank, 51 Ohio St. 106, 36 N. E. 833); and the same is true as to a holder who procures the check to be certified before delivery. He is a new drawer and will be held liable as well as the bank. If, after delivery, the holder procures a check to be certified, the drawers and indorsers are thereby discharged. Daniel on Negotiable Instruments, § 1601a; Rev. St. 1908, § 3177y. In this case the payee, Blake, procured the certification of the check after delivery to him and before delivery by him to Werbel, thereby discharging Blake & Co., the drawers, and making himself as well as the bank liable on the check. Section 3177x, Rev. St. 1908, provides that where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance, and under section 3177z, Rev. St. 1908, by necessary implication, the certification operates as an assignment of the funds to meet the check and makes the bank liable to the holder.

What, then, are the rights of the parties? If Blake had given Werbel money, instead of the check, and Werbel had deposited the money to his credit in the Hamilton Bank, the relation of debtor and creditor between the bank and Werbel would thereby have been created. In C., H. & D. R. R. Co. v. Bank, 54 Ohio St. 60, 71, 42 N. E. 700, 702, 31 L. R. A. 653, 56 Am. St. Rep. 700, it is said by Spear, J.: "The relation of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and cestui que trust." And again: "The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and

Digitized by Google

continuous." The money would belong to the bank, and Blake could not acquire any interest in it or impose any liability on the bank merely by notifying it that Werbel had obtained the money from him by defrauding him in a horse trade. If, instead of money, Blake had traded a piano to Werbel for the horse, it may be that Blake could repudiate the trade on the ground of fraud, and that after tender back of the horse the title to the piano would reinvest in him, and that he could then recover it from any one excepting a bona fide purchaser; but money loses its identity, and, if the relation of debtor and creditor between the bank and Werbel would arise upon the deposit of the money, then the bank would necessarily be treated as a bona fide purchaser, and title to the money would not be restored to Blake even by a repudiation of the trade and a tender back of the horse. Now, while it is true, as has been pointed out, that the delivery of the check was not payment for the horse, and that Blake was liable on the check, still, if certified checks are to circulate as money and to perform the useful purpose in trade they have heretofore, the deposit of them in bank to the credit of the holder must be, so far as the rights of the indorser are concerned, treated as a deposit of money. The transaction under consideration may serve in some slight measure to illustrate their use. Blake may have supposed that Werbel would want cash for the horse and would not accept his check, and, not wishing to carry the money from Cincinnati to Hamilton, he procured the certification of the check, and Blake accepted it as readily as he would have accepted cash; but, if he could not accept it with the same security that he could cash, then, under such circumstances, a certified check could not be used at all, or the indorsee of such a check, if he wishes to avoid embarrassment and delays, such as have resulted in this case, must at once present the check for payment and then deposit the money, instead of the check, in bank. This being so, then the obligation of the Franklin Bank to pay the check was not affected by the notice to it by Blake not to pay, and the right of the Hamilton Bank to enforce payment was not affected by notice of Blake's claim.

Some question is made as to the right to an order of interpleader in such a case as this; but, in view of the conclusion reached, it is not necessary to consider it. And it may be added that, even if the certified check were not treated as money, but as property Blake had given Werbel for the horse, Blake could neither recover it nor defend against payment of it in a suit upon it, in the absence of a showing that he had repudiated the trade and had tendered the horse to Werbel, which was not done in this case, nor was Werbel made a party to the action. Morrison v. Eaton, Tapp. 173; Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294, 70 N. E. 74, 100 Am. St. Rep. 666; Archer v. Bamford, 3 Stark. 175; Lewis v. Cosgrave, 2 Taunt. 2; Heaton v. Knowlton et al., Adm'rs, 53 Ind. 357; Grubbs et al. v. Barber, 102 Ind. 131, 1 N. E. 638.

The judgment is affirmed.

PRICE, C. J. and SHAUCK, CREW, and SPEAR, JJ., concur.

Digitized by Google

Decision No. 1156.

UNION TRUST CO. v. HASSELTINE.

(Supreme Judicial Court of Massachusetts. Suffolk. January 5, 1909.)

86 N. E. 777.

PLEDGES — FORECLOSURE UNDER POWER OF SALE — RIGHT OF PLEDGEE — PLEDGE OF NOTE — COLLECTION BY PLEDGEE — DIVIDENDS — MORTGAGES — FORECLOSURE OF SALE — RIGHTS OF PURCHASER.

1. The pledgee of a mortgage has a right to foreclose it, even though the contract of pledge only authorizes the pledgee to sell the mortgage.

2. The pledgee of a note may collect it when it becomes due.

3. The dividend on corporate stock may be collected by a pledgee of the stock.

4. A pledgee of a mortgage under a contract giving him full power to sell the mortgage "at any brokers' board or any public or private sale," and to be the purchaser at such sale, may purchase at a foreclosure sale under a power in the mortgage; but he takes such title as trustee for the pledgor, and holds it subject to redemption by payment of the debt for which it was pledged, although under a contract of pledge expressly authorizing him, not only to foreclose the mortgage, but to purchase at the foreclosure sale, he would have the right to purchase for himself at a foreclosure sale.

Exceptions from Superior Court, Suffolk County; John C. Crosby, Judge.

Action by the Union Trust Company against John Hasseltine. Verdict for plaintiff, and defendant takes exceptions. Exceptions sustained.

Willard Howland and Clarence A. Warren, for plaintiff. Clarence F. Eldridge, for defendant.

KNOWLTON, C. J. The defendant pledged to the plaintiff three mortgages, as collateral security for the payment of his promissory note. The contract of pledge gave the plaintiff "full power and authority to sell and assign and deliver the whole of said property or any part thereof, or any substitute therefor, or any addition thereto, at any brokers' board or any public or private sale, at the option of said trust company or its president or treasurer, or its or their or either of their assigns, and with the right to be the purchasers themselves at such broker's board or public or private sale, on the non-performance, of this promise, . . . without advertisement or notice," etc. The questions before us arise on the action of the plaintiff upon one of these mortgages. This mortgage the plaintiff foreclosed, by a sale under a power in the mortgage, for a breach of the condition thereof. It is agreed that this sale was made in good faith, and in accordance with the terms of the power. The plaintiff, though a third person, became the purchaser at the sale, and took from him a transfer of the property, which we assume was done under the authority of the power. The defendant was sued in this action for a balance

Digitized by Google

due upon his debt to the plaintiff, and he offered to prove that the plaintiff acted in bad faith in disposing of the property acquired under the foreclosure, and sold it for much less than it was worth. He claimed an allowance upon the note for its value.

The first question is whether the plaintiff could make a valid foreclosure of the mortgage under the power of sale contained therein. It was an assignee of the mortgage and was within the terms of the power given by the mortgagor. As the holder of the mortgage title it had the right to foreclose, unless restrained by the terms of its contract with the defendant as pledgor. The contract was silent on this point. The broad power to sell the pledged property did not in itself give a right to foreclose the mortgage. But the pledgee of property has the control of it for the time being, and he represents not only his own interest, but that of the pledgor, in taking any proper action for the preservation of it and the collection and care of its proceeds. If the pledged property is a promissory note or other evidence of debt, he may collect it when it becomes due. If it is stock in a corporation he may collect the dividends. If it is a mortgage upon land and regularly assigned to him, he may foreclose the mortgage for a breach of the conditon, if he deems such action best for the interests of himself and the pledgor. 22 Am. & Eng. Encyc. of Law (2d ed.) 895, 896, and cases cited. The right of a pledgee to forclose a mortgage is recognized in this commonwealth, although most of the cases show a foreclosure by an entry and possession, rather than by sale. Brown v. Tyler, 8 Gray 135, 69 Am. Dec. 239; Stevens v. Dedham Institution for Savings, 129 Mass. 547–549; Montague v. Boston & Albany Railroad Company, 124 Mass. 242–245. The language in the case of Lord v. Hartford, 175 Mass. 320, 56 N. E. 609, in which it was held that a pledgee "is precluded from buying the property pledged at a foreclosure sale, on the ground that his duty to the pledgor is inconsistent with his interest as a purchaser," was used of a purchase in reference to the right acquired under it as against the pledgor. He cannot take the title by virtue of the purchase at the auction sale and hold it absolutely, as against the pledgor. If he buys, he takes the title as a trustee for the pledgor, and holds it subject to redemption by him on the payment of the debt for which it was pledged. It was not intended to intimate that his right to foreclose, under the power, by virtue of his title as holder of the mortgage, does not enable him to buy it at the auction sale to prevent the sacrifice of the property, if the power in the mortgage gives such a right. If he does this, as was held of a similar foreclosure by possession in each of the cases above cited, he holds as a trustee for the pledgor, as well as for his own security. It was decided otherwise upon the facts in Jennings v. Wyzanski, 188 Mass. 285–289, 74 N. E. 347, because, by the terms of the pledge, he was expressly authorized, not only to foreclose the mortgage, but to purchase at the foreclosure sale. This as between the pledgor and pledgee, was held to give the pledgee a right to buy for himself at the sale.

It follows that the plaintiff, after the foreclosure, held the real estate in trust for the defendant, and it had no right to sell it without regard to his interests. The terms of the contract of pledge gave it no right to make such a sale as that which the defendant offered to prove. The third instruction requested should have been given.

Exceptions sustained.

Digitized by Google

Decision No. 1157.

KELLY v. BEERS et al.

(Court of Appeals of New York. January 5, 1909.)

86 N. E. 980.

COURTS — APPEAL FROM APPELLATE DIVISION BY DIVIDED COURT — REVIEW — BURDEN OF PROOF — BANKS AND BANKING — DEPOSITS — TITLE TO DEPOSITS — JOINT ACCOUNTS — GIFTS — INTER VIVOS — BANK DEPOSITS — EVIDENCE.

1. A plaintiff, appealing from a judgment of the Appellate Division, affirming by divided court a judgment of the Supreme Court dismissing the complaint on the merits on a question of fact, has the burden on the appeal of establishing his theory and claim as a matter of law, and beyond any question of fact.

2. A bank account may be so fixed that two persons shall be joint owners thereof during their mutual lives, and the survivor take on the death of the other.

3. A deposit in a savings bank by one person of her money in her name and the name of another, her daughter, or the survivor of them, imports on its face joint ownership by the depositor and her daughter, with final sole ownership by survivorship; but it is not sufficient to establish the intent of the depositor to give to the daughter joint interest in, or ownership of, the deposit.

4. One deposited money in a savings bank in her own name. Subsequently she changed the account so as to make the deposit stand in her own name and the name of another, her daughter, or the survivor of them. The change was made for the purpose of enabling the daughter to get the deposit on the depositor's death. After the change had been made, the depositor frequently stated that she had fixed her bank account so that either she or her daughter could draw the money out at any time, and that in the event of her death the daughter would have the deposit. The passbook was taken by the daughter and placed in the joint and equal custody of both. The depositor was capable of taking care of herself, and of her affairs, so that there was no necessity for conferring on the daughter the power to draw money as a matter of convenience. Held to show that the depositor intended to give the daughter joint interest in, and ownership of, the deposit, authorizing the daughter to claim the deposit on the depositor's death, though the depositor had prior to the changing of the account made a will disposing of her deposits.

5. Where the acts constituting a gift inter vivos by a parent to a child are not of doubtful or uncertain character, the fact that the child, on the gift being upheld, will receive a greater share of the parent's estate than another child will receive on the distribution of the estate under the parent's will executed prior to the gift, cannot be considered in determining the intent of the parent to make the gift.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Sarah E. Kelly against Franklin B. Beers and others, executors of Kate V. Beers, deceased, and another. From a judgment of the Appellate Division (108 N. Y. Supp. 1138), affirming by divided court a judgment of the Supreme Court, dismissing the complaint on the merits, plaintiff appeals. Reversed, and new trial granted.

The action was brought to establish plaintiff's ownership of a deposit in the defendant Home Savings Bank payable to her or the

Digitized by Google

deceased, Kate V. Beers, or the survivor, and the following facts, amongst others, were established beyond dispute, most of them being found by the trial court:

The deceased and the plaintiff were mother and daughter, part of the time at least residing together, and the only other child was a son, Franklin. For some time prior to September 30, 1901, Mrs. Beers was the sole owner, in her individual name, of a deposit in the defendant bank amounting to $1,829.34. Several weeks before said date she asked one of the bank officials if she could not have her account fixed so that either she or her daughter could draw the money at any time, and so that if anything should happen to her the daughter could get the money without any further trouble, and he told her to bring in her daughter and he would "fix it up." On the date mentioned she came to the bank with her daughter, whom she introduced to the treasurer, telling him that she had come to have the book fixed up as previously talked about between them, and the treasurer told her that he would close out the old account and open a new one and put it in the name of Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them, and that would fix it as she wished. He then filled out a check for the old account as it stood in the name of Mrs. Beers, who signed it and with it surrendered her old pass book. The treasurer then said to the two: "This fixes the account so that either one can draw the money out at any time, and in the event of the death of either the survivor is absolute owner. The will, executors, administrator, or either has no control whatever over the book." He then called his assistant to take the signatures of the mother and daughter in the depositors' signature book and filled out a new pass book, headed as follows: "The Home Savings Bank of Albany, N. Y., in account with Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them," and in this pass book he credited the sum of $1,829.34 passed from the old account. After making her signature and seeing her daughter do likewise, Mrs. Beers asked the assistant "if the money was fixed so that in case anything should happen to her plaintiff could get it without any trouble," and also if plaintiff should go to the bank "could she draw the money at any time," and the assistant, in answer to both questions, said. "Yes." The deceased took the new bank book and handed it to plaintiff.

Substantially similar transactions occurred at other banks in which Mrs. Beers had accounts originally standing in her sole individual name. In the case of the Albany Savings Bank, where she had an account aggregating $3,000, after asking and being advised "how she could arrange her book so her daughter could draw the money the same as herself," in the presence of her daughter she signed and delivered a written order, filled out and explained to her, reading as follows: "The treasurer of the Albany Savings Bank will please add the name of my daughter Sarah E. Kelly as owner and creditor with me of all moneys heretofore or which may hereafter be deposited in said bank under this account No. 112,086, together with all the interest which has been or may hereafter be credited to the said account, with full authority for each or either of us or the survivor of us to draw out said bank the whole or any part of such moneys or such interest." After executing this order her former pass book and the books of the bank were so changed as to make the account read

Digitized by Google

"Albany Savings Bank in account with Mrs. Kate V. Beers or Sarah E. Kelly, her daughter, or survivor." In the case of the Albany Trust Company, Mrs. Beers executed and delivered to the bank an order similar in all respects to that last above set forth, and thereupon her pass book and the books of the bank were changed so as to read: "Albany Trust Company in account with Kate V. Beers, or Mrs. Sarah E. Kelly, payable to either, or survivor of either." In the case of the National Savings Bank she caused her account to be so changed as to make it "in trust for Sarah E. Kelly, her daughter."

The deceased at various times in 1897, 1902, and 1903 talked with various witnesses, apparently disinterested and credible, about her bank accounts, and to each one of them in substance said that she intended to have, or had had, the money in the banks fixed so that the plaintiff could draw it out at any time during her life and would have it upon her death. She also upon one or more occasions spoke of the difference in the provisions for the plaintiff and her son respectively, and explained that the more favorable one in behalf of the former was due to the fact that she had no means, while the latter was in good circumstances. The pass books for all these accounts were kept locked up in a receptacle to which each party had a key. The mother died in 1903, and prior to such decease the acount involved in this action had been increased to about $2,400. No withdrawals were made from it, and none appear to have been made on any of the accounts except of interest, and on two or three occasions such withdrawals were made by the plaintiff in her own name, and it does not appear that such moneys were by her turned over to her mother. By will executed in December, 1889, the deceased gave a legacy of $5,000 to plaintiff and also to her brother. In 1895 she revoked this will and made another one giving legacies of $4,000 and $3,000, respectively, to plaintiff and her brother. June 20, 1900, she made a codicil to the last will, whereby she revoked the legacy to her daughter of $4,000, and in lieu thereof gave her "all and whatever money I shall at the time of my decease have on deposit in the Albany Savings Bank." In December, 1900, she made another will revoking former ones, whereby she gave her son a specific legacy of certain property amounting on its face to $8,350, and gave to plaintiff "subject to the payment of my funeral expenses therefrom all and whatever money I shall have on deposit in any of the savings banks or other banks in the city of Albany, N. Y., at the time of my death, which amount I intend shall be about $7,000," further providing, however, that in case there should not be $7,000 on deposit in said banks said sum should be made up from other moneys coming into the hands of the executors. The total bank deposits standing in the name of the deceased and plaintiff as above stated on the death of the former amounted to $9,878, and her estate and the aggregate of said accounts amounted to about $24,000. The deceased, while quite aged at the time of her death, was active physically and in full possession of her mental faculties. The trial court found that, when the change in the form of the account herein involved was made, the deceased did not intend to create a joint ownership in herself and plaintiff or transfer the title or part with the right to control said account by will.

Andrew J. Nellis, for appellant. William P. Rudd, for respondents.

Digitized by Google

HISCOCK, J. (after stating the facts as above). The appellant claims that she is the owner of moneys originally belonging to and deposited in the sole name of her mother, the deceased, but later and at the time of the latter's death deposited in an account payable to "Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them." Her entire theory is that she was joint owner with her mother of these moneys during the latter's life and upon her death became entitled to the whole thereof as survivor. The trial court has found against her on the crucial question of the mother's intent in making and continuing the later deposit, and therefore she assumes the burden on this appeal of establishing her theory and claim as matter of law and beyond any question of fact. I think she has successfully borne this burden. The possibility of so fixing a bank account that two persons shall be joint owners thereof during their mutual lives, and the survivor take upon the death of the other, is so well established that we may assume and need not discuss it. I think, also, it is so apparent that it must be conceded that the account in question on its face imports such joint ownership by appellant and the deceased with final sole ownership by survivorship. It has been written, however, in various decisions, that the mere form of the account in such a case as this will not be regarded as sufficiently establishing the intent of the person making it to create a trust in behalf of another or to give to such another joint interest in or ownership of the deposit. Beaver v. Beaver, 117 N. Y. 421, 430, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531; Matter of Bolin, 136 N. Y. 177, 179, 32 N. E. 626; Matter of Totten, 179 N. Y. 112, 125, 71 N. E. 748, 70 L. R. A. 711. Therefore it becomes proper to make brief reference to facts already stated in full which tend to establish that the deceased did intend to give to her daughter the interest claimed by the latter, and that this intent was consummated in the deposit which was made and aptly and faithfully expressed in the title and form of that account.

Such facts show: The deceased frequently stating to outsiders that she desired to have her bank deposits fixed so that her daughter might have or draw them at any time during her life and have them at her death. Then explicitly and formally asking an official of the defendant bank "if she couldn't have her bank account fixed so that either she or her daughter could draw the money at any time, and that if anything should happen to her that her daughter could get the money without any trouble." Then, in accordance with his instructions, going with her daughter to the bank to have this arrangement perfected, and, under the instructions of the official, closing up the old account and opening the new one in the form stated, for the purpose of accomplishing her intent, being told as and after she performed the necessary acts that "this fixes the account so that either one can draw the money out at any time, and in the event of the death of either the survivor is absolute owner. The will, executor, or administrator or either has no control whatever over the book," and that "the money was fixed so that in case anything should happen to her plaintiff could get it without any trouble, and . . . could draw the money at any time" if she "should come there to the bank." And after the signatures of both as depositors had been entered in the proper bank book, the pass book was taken by the daughter and placed in the joint and equal custody of both, and from

Digitized by Google

that time to her death the deceased never did a thing which threw any shadow on her intent in making the new deposit, or indicated the slightest change in or abandonment or revocation of such intent. And, further, and as illustrating the extent and absoluteness of the interest which she intended to give to her daughter in the bank accounts, we find that in the case of deposits in other banks by formal writing she made the daughter "owner and creditor" with her of all moneys deposited and authorized each or either of them or the survivor of them to draw out the whole of said deposits.

It seems to me that all of these facts demonstrate the purpose of the deceased to give to the appellant the interest which she claims with a clearness and force beyond that required by the authorities. Mack v. Mechanics & Farmers' Sav. Bank, 50 Hun 477, 3 N. Y. Supp. 441; Farrelly v. Emigrant Industrial Sav. Bank, 92 App. Div. 529, 87 N. Y. Supp. 54; Mabie v. Bailey, 95 N. Y. 206; Beaver v. Beaver, supra, 431; Matter of Totten, supra; Augsbury v. Shurtliff, 180 N. Y. 138, 141, 72 N. E. 927; Id., 114 App. Div. 626, 99 N. Y. Supp. 989, affirmed 190 N. Y. 507, 83 N. E. 1122; West v. McCullough (decided without opinion, January 5, 1909), 113 N. Y. Supp. —. It is true that some of the foregoing cases simply decided that the evidence there presented authorized a finding as matter of fact of a gift such as is claimed here; that being the only question presented. But principles necessarily involved or enunciated sustain the interpretation now placed on them as applied to the facts which have been discussed.

It remains to consider the respondents' argument that the foregoing view is incorrect, or at least that there is other evidence which, taken in connection with that especially referred to, permits inferences sustaining the findings in their behalf. Before passing to a consideration and analysis of this, reference may be made to one finding of fact which is almost in favor of appellant. It is found: "That the change in the account in the Home Savings Bank of the city of Albany on the 30th day of September, 1901, was made by said Kate V. Beers merely as a matter of convenience in drawing the moneys from the bank, and also to vest the title to the fund remaining at the time of the death of Mrs. Beers, in her daughter, if she survived her." Inasmuch as the only legal method by which the deceased could vest the title to the fund remaining at the time of her death in her daughter was by making her a present joint owner in the account, and inasmuch as the form of the account payable to either was found by the trial judge, it is argued that this finding established appellant's case and entitles her to a reversal. I prefer, however, to assume that the findings on the question of intent, etc., are adverse to the appellant, and to consider the case with reference to the question whether there is any evidence to sustain such findings.

While the counsel for respondents, in disputing that the deposit was made with the intent and for the purpose claimed by Mrs. Kelly, says that, on the other hand, it was made and the power to draw moneys given as a matter of convenience, he very frankly admits that he does not mean any mere physical convenience. This element was not involved, for Mrs. Beers was so capable of taking care of herself and of her affairs that there was no necessity for conferring upon the daughter the power to draw money as a matter of convenience to her mother. This term of "convenience" seems rather

Digitized by Google

to have been used by the court and counsel as a form of stating that the mother did not intend joint ownership, but did intend something else.

In the first place, it is said that Mrs. Kelly at the time of her mother's death made an admission to one of the defendants contradicting her present claim. Without quoting this admission, it may be stated that it has been analyzed, and that I see nothing in it which contradicts the present claim. It does not give a full history of all that was done, as actually found by the trial court; but, so far as it does go, it does not raise any issue with the other testimony.

In the second place, it is urged that the various wills and codicils made by the deceased are indicative of an intent on the part of Mrs. Beers to maintain her ownership and control of the bank accounts and therefore are contradictory of that which is claimed by appellant. There appear to be several answers to this proposition. If the deceased, having an intent to give joint and surviving ownership to her daughter, consummated that intent by the performance of the necessary acts, I suppose that the original nature and effect of these acts would not be affected or destroyed, even if subsequently her views changed; such mental change not being carried into any legal or effective revocation of that which had been done. In the Mabie case, cited supra, the person making a deposit in trust which was the subject of litigation subsequently withdrew the same, and it was claimed that this indicated that he did not intend to create a trust, but Judge Andrews said, at page 211: "The fact that the deposits for the plaintiff and others were subsequently .. . . drawn out by Dr. Bailey is not legitimate evidence that he did not intend when the deposits were made to create a beneficial trust for the beneficiaries named. If the withdrawal was with intent on his part to ignore the trust and to convert the money to his own use, it might be competent evidence of a change of purpose, but it throws no light on the original transaction." See, also, Scheps v. Bowery Savings Bank, 97 App. Div. 434, 90 N. Y. Supp. 26.

But further than this, if it should be assumed that there was anything in the wills when executed which could be regarded as sufficient to negative the idea or counteract an intent of Mrs. Beers to create a joint ownership in a bank deposit, I do not think that it would affect this case. All of the wills and codicils admitted in evidence as bearing on this question were executed before the deposit involved in this action was changed into its present form. Those instruments, of course, if they bore on the subject at all, indicated the testator's intent at the respective dates when they were executed. Therefore, if this deposit subsequently made was at variance with any provisions in them, it, and not they, must be controling. Even though it be assumed that the deceased originally intended to dispose of her bank deposits by will, that would not interfere with or destroy a purpose subsequently formed and executed to dispose of them through the form of the deposits themselves as was done.

Lastly, in somewhat general terms it is insisted: That the deceased did not inquire about joint ownership or transfer of title; there was no idea or suggestion of a present gift or transfer; she did not part with the control of the title or intend to create a new kind of ownership or intend to give Mrs. Kelly the right to have an equal share of the income or by means of the transfer obtain an absolute,

Digitized by Google

immediate ownership of one-half of the fund; did not intend Mrs. Kelly should draw the moneys during her life. It seems to me that these assertions are the expression of a theory unjustifiably evolved from assumptions, rather than the statement of conclusions legitimately drawn from the evidence. It has been held so many times that courts will be controlled by the substance of a transaction, rather than by the name given to it, that it is a matter of no importance that the particular terms "joint ownership" and "joint account" were not used by Mrs. Beers. The controlling question for us has been, and is, whether she intentionally and intelligently created a condition embracing the essential elements of joint ownership and survivorship. If she did, that was sufficient, even though she did not use any particular formula in doing it. Her acts and repeated declarations indicate that she did intend to do just that which is denied, give to her daughter joint ownership in and control over this account. It is true that her daughter did not draw any checks on it during the life of the mother, but it is also true that the mother herself did not draw any checks on it during the same time. It is true that the mother did retain control over the account in that she had the right at any time to check out all of the moneys and destroy the account, but so did the daughter. For the sake of the argument we might assume that the primary purpose of the mother in creating the account was to pass the money on her death to her daughter, and that she did not expect under ordinary circumstances that the daughter would draw out the money during her life any more than that she herself would draw it out; but, if we assume all of this, such assumption would simply go to the expected exercise by the daughter of her legal rights rather than to the existence itself of those rights. In short, starting with the performance by Mrs. Beers deliberately and advisedly of certain acts legally calculated and sufficient to accomplish certain purposes, and charging her not only as we must as a matter of law, but as we ought to as a matter of fact, with appreciation of the significance and consequences of what she did, we are unable to discover in this record any evidence of an intent not to effect that legal result which her acts naturally and presumptively did accomplish.

Some reference was made to the equities of the division of the mother's estate between the appellant and her brother, if the former's claim to these deposits should prevail. While such considerations might be helpful under some circumstances in helping us to decipher the obscure or uncertain intent of a deceased person, I do not think they are of consequence in this case in dealing with well-established acts which are not of doubtful or uncertain character. Moreover, it is possible that on the settlement of the estate of the deceased under her will such disparity as is now claimed between the provisions for the two children respectively will be avoided or be found to exist.

The judgment appealed from should be reversed, and a new trial granted, with costs to abide event.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. CHASE, J., not sitting.

Judgment reversed, etc.

Digitized by Google

Decision No. 1158.

KELLY v. BEERS et al.

(Court of Appeals of New York. January 5, 1909.)

86 N. E. 985.

GIFTS — INTER VIVOS — BANK DEPOSITS.

A depositor in a savings bank changed the deposit standing in her own name so as to make it payable to herself or another, her daughter, or survivor. The change was made under the depositor's written direction to the bank to add the name of the daughter as "owner and creditor" of all moneys deposited under the account. Subsequently thereto the depositor made a will disposing of her savings bank deposit and giving it to her daughter. Held, that the daughter was a joint owner of the deposit, and the depositor's disposition of the deposit by will did not destroy the daughter's rights.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Sarah E. Kelly against Franklin B. Beers and another, as executors of Kate V. Beers, deceased, and another. From a judgment of the Appellate Division (108 N. Y. Supp. 1137), affirming a judgment of the Supreme Court, dismissing the complaint, plaintiff appeals. Reversed, and a new trial granted.

Andrew J. Nellis, for appellant. William P. Rudd, for respondents.

HISCOCK, J. It was practically assumed on the argument that our decision in this case would be governed by the conclusions which we might reach in the Home Savings Bank Case (decided at this term), 86 N. E. 980, and we think that this assumption was proper. There seem to be only two particulars of any importance in which the evidence in this case differs from that produced in the other one. In this case the form of the deposit, which originally stood in the name of Mrs. Beers alone, was on or about May 4, 1897, changed by adding words to the heading of the pass book and to the title upon the bank books making the account payable to Mrs. Beers, "or Sarah E. Kelly, her daughter, or survivor." This was done under a written direction to the bank to "add the name of my daughter, Sarah E. Kelly, as owner and creditor with me of all moneys heretofore or which may hereafter be deposited in said bank under this account, No. 112,086, together with all the interest which has been or which may hereafter be credited to the said account, with full authority for each or either of us, or the survivor of us, to draw out from the said bank the whole or any part of such moneys or such interest." After this change was made a new codicil to a former will and a new will were made and executed by Mrs. Beers, both of which referred to her savings bank deposits, the first one revoking a former legacy to her daughter, and in lieu thereof giving her "all and whatever money I shall at the time of my decease have on deposit in the Albany Savings Bank." It appeared that the deposit in suit was the only one which the testatrix then or thereafter had in said bank.

It does not seem to us that these differences are sufficient to warrant any different result than that reached in the other case. The

Digitized by Google

circumstances under which the change in the form of the deposit was made seem to be a little more favorable to the appellant in this case than in that, for here the order directing the change expressly and specifically requests that the appellant shall be made "owner" and "creditor" (as against the bank) of all moneys then or thereafter deposited. This, with the form of the account, seems to make the appellant a joint owner almost beyond the chance of debate. The codicil especially referred to was executed in 1900, after the deposit involved in this action was made, and, while in that respect and in respect to the mention of deposits in the Albany Savings Bank it is a little more favorable to the respondents than were the wills and codicils as involved in the Home Savings Bank case, we do not think that it has the effect to destroy or impair the intent actuating the deceased when she made the deposit, or to revoke the acts then performed in consummation of such intent. The mere fact that the mother assumed by her will to accomplish the same purpose in giving this deposit to her daughter at her death, which had already been accomplished by the form of the savings bank deposit, does not of itself contradict her intent in making the deposit, but in fact supplements it in one respect.

The further fact that she disposes of moneys as those which she may have on deposit in the defendant bank at the time of her decease, it appearing that she did not have any deposit other than that claimed by appellant, is not in my opinion sufficient to raise an issue of fact in respect to her intent in making such latter deposit. In the first place, such testamentary provision might be drafted as a matter of precaution to cover over any new deposit which she might make before death, or as a matter of precaution to secure her purpose of having the daughter take the moneys at her death in case the arrangement at the bank should fail. Various motives might influence her, and I do not think that any such subsequent indeterminate act is enough to cloud a purpose or offset acts so clearly, deliberately, and completely formed and executed as were those of deceased in respect to the bank deposit; but if we should assume that, when the testator made these provisions, she did not have in mind this deposit and did intend to treat it as still so far subject to her control as to be a matter of testamentary disposition, in my opinion such attitude would not be enough to revoke her prior intention and acts already consummated in a legal and effective form, especially in view of the fact that no attempt was made directly to revoke them down to the time of her death. I see no difference in this respect between a case of consummated gift of a deposit and one of a trust and of such a deposit, as protected from subsequent declarations and acts. Mabie v. Bailey, 95 N. Y. 206; Scheps v. Bowery Sav. Bank, 97 App. Div. 434, 90 N. Y. Supp. 26; Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. Supp. 1, affirmed 173 N. Y. 626, 66 N. E. 1115.

The judgment should be reversed, and a new trial granted, with costs to abide event.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. CHASE, J., not sitting.

Judgment reversed, etc.

Digitized by Google

Decision No. 1159.

CONSOLIDATED NATIONAL BANK OF NEW YORK v. FIRST NATIONAL BANK OF MIDDLETOWN.

(Supreme Court, Appellate Division, Second Department. December 30, 1908.)

114 N. Y. Supp. 308.

BANKS AND BANKING — CHECKS — PAYMENT — IRREVOCABILITY — JUDGMENT — CONCLUSIVENESS — RIGHTS OF INDORSEE.

1. When defendant bank paid a check drawn on it, marking it paid, crediting it to the indorsee's agent's account, and charging it to the drawer's account, the transaction was irrevocably closed; defendant becoming indebted to the agent and being powerless to subsequently charge the check back.

2. The drawee of a check having credited the indorsee's agent's account with the amount thereof and charged it against the drawer's account, before the drawer's assignee sued to have ownership of the drawer's deposit declared to be in him, judgment for the assignee in that suit did not preclude the indorsee from suing the drawee for the amount of the check, which after being so credited was charged back; the effect of the judgment merely contemplating that all money to the drawer's account should be paid to his assignee.

3. Where a check was marked paid and credited by the drawee to an indorsee's agent's account and was afterwards charged back, the indorsee did not waive any of its rights as against the drawee by failing to appear or answer in a subsequent suit by the drawee's assignee to have ownership of the deposit declared to be in him, where the only allegation in the complaint touching the check was that the indorsee claimed an interest in the deposit, and where no notice was given in the complaint that the validity or fairness of the transaction resulting in payment of the check would be attacked.

Appeal from Trial Term, Orange County.

Action by the Consolidated National Bank of New York against the First National Bank of Middletown, N. Y. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before JENKS, HOOKER, GAYNOR, RICH and MILLER, JJ.

Abram F. Servin, for appellant. Henry W. Wiggins, for respondent.

HOOKER, J. While the facts in this case are a little unusual, I see no difficulty in the application of one or two very plain principles of law which have been long established.

The facts are not in dispute. Davis & Co., a corporation, on the 8th day of December, 1904, drew its check for $150 in New York city upon the defendant bank to its own order, indorsed it, and obtained the money thereon from the plaintiff bank. The plaintiff forwarded the check for collection to its Albany correspondent, the Albany Trust Company, which forwarded it to the defendant, by which it was received on Saturday, December 10th. On Monday, December 12th, Davis & Co. had on deposit with the defendant bank

Digitized by Google

to its credit $473. On that day the defendant bank marked the check paid, and charged the amount thereof against the account of Davis & Co., and credited it on their books to the account of the Albany Trust Company, which was conceded to be plaintiff's agent. Some time on that day, whether before or after the marking of the check paid and its entry in the books matters not, one Seaman called at the defendant bank and advised the officers thereof that the money to the credit of Davis & Co. in that bank belonged to him, and he forbade the payment of any checks drawn upon that account. The next day the defendant bank canceled the paid mark upon the check, and made other entries upon its books, crediting the amount of the check to the account of Davis & Co. and charging the account of the Albany Trust Company therewith. The check was then protested and returned to the plaintiff. A few days later, Seaman commenced an action in equity against this defendant, this plaintiff, Davis & Co., and the trustee in bankruptcy of Davis & Co., which had meanwhile been adjudged bankrupt; the purpose of the action being to declare the ownership of the $473 on deposit in the defendant bank to the credit of Davis & Co. to be in the plaintiff Seaman. This plaintiff, the Consolidated National Bank of New York, was served in that action, but did not appear or answer, and judgment was ultimately taken therein by default, adjudging that the sum of $473 specified in the complaint, and in possession of the defendant, the First National Bank, was the sole property of Seaman, and that it be paid by the First National Bank of Middletown to Seaman.

The check, when presented to the defendant, was paid by its acceptance by the defendant as valid, by marking the same paid, crediting the amount to the account of the plaintiff, and charging it against the account of Davis & Co. As a matter of law, that closed the transaction without power of revocation. The defendant bank had become the debtor of the plaintiff's agent to the extent of the amount of the credit given, which was the amount of the check. In Oddie v. National City Bank of New York, 45 N. Y. 735, 741, 6 Am. Rep. 160, the court says:

"Here the plaintiffs clearly put in the check as a deposit, and the defendants as clearly received it as such, and credited the plaintiff with it. The credit on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the pass book of the plaintiffs, and entered upon the books of the bank. Financial business is transacted at banks in large amounts, with great rapidity, but according to definite and certain rules, which are well understood and acted upon by those engaged in that business. Very little is said, but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business. In determining the legal effect of such transactions, we must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties, to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs, and then deposited. When a check

Digitized by Google

is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in Pratt v. Foote, 9 N. Y. 463; but if it accepts such a check and pays it, either by delivering the curency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine. In the case of a deposit, the bank becomes at once the debtor of the depositor, and the title of the deposit passes to the bank. The bank always has the means of knowing the state of the account of the drawer, and, if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter."

In legal effect there was just as much a payment of the check of $150 by the defendant to the plaintiff through its Albany correspondent, as though a messenger from the plaintiff bank had presented the check at the teller's window of the defendant bank and received therefor the currency. Inasmuch as this conduct took place before the commencement of the Seaman action and before judgment therein, that action cannot, of course, be a bar to the maintenance of this. Suppose that an officer of the plaintiff bank had presented this check personally to the defendant bank on the 12th of September and received therefor $150 in currency. The transaction was perfectly valid. Davis & Co. had nominally to its credit with the defendant bank a sum sufficient to pay the check, and it cannot be supposed that Seaman, in the action which he brought, could have reached this sum of $150 in the hands of the plaintiff bank after such actual payment in cash. The defendant is in no better position, as the facts are. If there had been, as there was in law, actual payment of this check by the defendant on the 12th of September, the Seaman action could not rightfully reach the $150 of such payment; if the defendant has paid out the full sum of $473 to Seaman, it has, of course, done so at its peril, and is unfortunately the loser. The adjudication in the Seaman case that $473 should be paid by the First National Bank of Middletown to him merely contemplated that all of the moneys with the First National Bank to the credit of Davis & Co. should be paid to Seaman. According to legal interpretation of the acts in connection with the presentment of the $150 check, there was not $473 to the credit of Davis & Co. with the defendant bank, but, rather, that sum less $150, which had been paid out of that account upon the 12th day of September. The failure of the plaintiff in this case to answer in the Seaman case deprived it of none of its rights which theretofore had become vested. The only allegation in the complaint of the Seaman case touching the transaction of the payment of this check was:

"Consolidated National Bank of New York claims to have an interest in the said fund remaining on deposit to the extent of at least one hundred and fifty dollars ($150)."

The Consolidated National Bank had no such interest in any fund, for there was in strict law no fund. By reason of the deposit with the First National Bank of Middletown it was indebted to Davis & Co. By reason of the acquiescence in the demand of the plaintiff by its Albany correspondent, the demand being based upon the presentment of the $150 Check, the First National Bank of Middletown became indebted to Davis & Co. for $150 less, and became indebted to

Digitized by Google

the agent of the plaintiff for $150 more. No allegation of the complaint in the Seaman case attacks the good faith of the payment of the check, or of the transfer of credit, which amounted to the same thing, and the plaintiff was entirely justified in failing to appear or answer in the Seaman case without waiving any of its rights, for no notice was given in the complaint that the validity or fairness of the transaction which resulted in the payment of the $150 check would be attacked.

The judgment ought therefore to be affirmed, with costs. All concur.

Decision No 1160.

SCARBROUGH v. CITY NATIONAL BANK.

(Supreme Court of Alabama. December 17, 1908.)

48 So. 62.

BILLS AND NOTES — ACTIONS — PLEADING — NOTICE OF DISHONOR — NOTICE TO AGENT — PARTIES — JOINDER — MAKER AND INDORSER — AMENDMENTS — COMPLAINT — STRIKING IMPROPER PARTIES — SUFFICIENCY — VERBAL NOTICE — FORM — LIABILITIES ON INDORSEMENT — INDORSER'S CONTRACT — EXEMPTIONS — WAIVER — ACTS CONSTITUTING WAIVER.

1. An allegation that notice of dishonor was given to one who was present at the indorser's place of business and in his employment was a sufficient allegation of notice to the indorser.

2. While the payee of a negotiable promissory note may sue both the maker and indorser at the same time in separate actions, in absence of statute he cannot sue them jointly.

3. The purpose of Code 1896, § 3331 (Code 1907, § 5367), requiring the court, during trial, to permit the complaint to be amended by striking out parties defendant, etc., is to permit improper parties to be stricken without working a discontinuance; and, the maker and indorser of a negotiable note being improperly joined as defendants, the complaint was properly amended by striking out the maker.

4. A verbal notice of dishonor to an indorser is sufficient, even though it was given to the agent of the indorser.

5. No particular form of notice of dishonor of a negotiable note is necessary; it being sufficient that the party liable is informed of its dishonor and notified that he will be held for payment.

6. The indorsement of a negotiable note is a separate and independent contract that the indorser will pay the note on due presentment and notice of dishonor, that the indorsement and signatures of prior parties to the note are genuine, that the indorsement is valid according to its purported effect, that the parties thereto are competent to contract, and that he himself has title and right to transfer.

7. Constitution 1901, § 210, authorizes an exemption of personalty to be waived by an instrument in writing, and Code 1907, § 4232 (Code 1896, § 2105), authorizes the waiver of exemptions as to personal property by a separate instrument in writing subscribed by the party making it, or in a promissory note or other written contract executed by him. A note stated that as a part of the consideration "we each, whether maker or indorser," hereby waive all right of exemption of personal property from levy and sale for the collection of the debt; but the indorse-

Digitized by Google

ment was simply by signing the indorser's name after such statement. Held, that the waiver must be in the writing signed by the party, and the maker could not waive exemption for the indorser, so that the waiver in the note did not operate as a waiver of exemption by the indorser.

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action by the City National Bank against Eba Scarbrough and another. From a judgment for plaintiff, defendant Scarbrough appealed. Modified and affirmed.

Count 1 of the complaint was against the defendant Gus Woodruff, and contained a claim for attorney's fees and a declaration of waiver of exemptions, with the averment that the note was executed by the defendant Gus Woodruff to one James Keith, Jr., and was by him for a valuable consideration transferred to the City National Bank. The second count claimed of the defendant Eba Scarbrough $100 due by note executed by Gus Woodruff, with the averment that said defendant Eba Scarbrough indorsed said note, and that demand for same had been made on Gus Woodruff, one of defendants herein and principal on said note, and payment had been refused, of which demand for payment and refusal to pay said defendant Scarbrough had had notice. Then follow claims for attorney's fees and a declaration of waiver of exemptions as to personal property and a proper transfer of the note from payee to present plaintiff. Count 3 is against Eba Scarbrough, and is exactly like count 2, except that no declaration as to the waiver of exemptions is made.

Demurrers were interposed to the complaint by defendant Scarbrough: "(1) Because it fails to show that there was any consideration passing to this defendant for his alleged indorsement of said note. (2) It is not alleged that said note was protested for non-payment at maturity. (3) It is not shown that this defendant had any legal notice of the dishonor of said note at maturity, or notice of protest thereof. (4) For that the demand for payment made upon the principal, and his refusal to pay the said note as in the said count alleged, does not fix upon this defendant as the indorser thereof any liability to the plaintiff in this case. (5) For that it is shown by the terms of said count that this defendant did not waive rights of exemptions by his indorsement of the said note." He also filed demurrers attempting to raise the question of misjoinder of parties defendant, in that said counts aver causes of action only against Woodruff, and because the suit is brought against the defendant jointly, and no count of the complaint seeks to recover against both of said defendants. The complaint was amended by adding the fourth, fifth, sixth, and seventh counts, which were practically the same as the original counts, with the exceptions that both defendants were joined in each count. Afterwards the defendant Gus Woodruff was stricken from each count, and the defendant Scarbrough thereupon moved for a discontinuance. The other facts sufficiently appear.

Lapsley & Arnold, for appellant. H. D. McCarty, for appellee.

SIMPSON, J. This suit was brought by the appellee against the appellant and Gus Woodruff. The cause of action is a negotiable promissory note alleged to have been signed by Woodruff and in-

Digitized by Google

dorsed by Scarbrough, and there are separate counts against each and others against both jointly.

The assignments of error first insisted upon are to the action of the court in overruling demurrers to the complaint as amended. There was no error in overruling said demurrers. The agency of said Noble, upon whom notice of dishonor of the note is claimed to have been served, is sufficiently set out in the count. It is also sufficiently alleged that said Noble was authorized to receive such notice. At any rate, the count alleges that the notice was given to Noble, "who was present at defendant's (Scarbrough's) place of business and in the service and employment of said Scarbrough," etc., which is sufficient. 3 Randolph on Commercial Paper, p. 241, § 1219; 7 Cyc. 1090. This covers all of the propositions with regard to the agency of Noble, and the question as to whether the written power of attorney, introduced in evidence, authorized Noble to accept notice of dishonor.

The next assignment of error insisted on is that the court erred in allowing the name of Gus Woodruff to be stricken out as a party defendant to the complaint. Section 3331 of the Code of 1896 (section 5367 of the Code of 1907). Our courts have held that one of the objects of this statute was to permit amendments striking out improper parties to the suit, wihout working a discontinuance of the action. Vinegar Bend Lumber Co. v. Chicago Title & Tr. Co., 131 Ala. 411, 30 So. 776; Evans Marble Co. v. McDonald & Co., 142 Ala. 130, 133, 37 So. 830; Masterson v. Gibson, 56 Ala. 56, 58; Jones v. Nelson's Ex'r, 51 Ala. 471; Mock v. Walker, 42 Ala. 668, 670; Leaird v. Moore, 27 Ala. 326, 328. While the payee of a negotiable promissory note may sue both the maker and the indorser simultaneously in separate actions, yet, without statutory provision to that effect, there is no authority for suing them jointly. 8 Cyc. 292; 3 Randolph on Commercial Paper, § 1669. In the case of Abercrombie v. Knox et al., 3 Ala. 728, 37 Am. Dec. 721, referred to by counsel for appellant, the reference is to "separate suits" against all the parties. 3 Ala. 729–731 (37 Am. Dec. 721). Seeking to hold Scarbrough as a joint debtor does not change the fact that he is merely an indorser. As it was improper to join the maker in a suit against the indorser, there was no error in allowing the complaint to be amended by striking out the maker.

As to the notice of dishonor, the law recognizes a verbal notice as sufficient. Martin, Dumee & Co. v. Brown, Shipley & Co., 75 Ala. 443, 448; Abels v. Planters' & Merchants' Ins. Co., 92 Ala. 385, 9 So. 423; Stephenson v. Primrose, 8 Port. 155, 159, 33 Am. Dec. 281; 7 Cyc. 1104. The fact that it was given to an agent cannot change the above principle. The case of N. Y. & Ala. Contracting Co. v. Selma Springs Bank, 51 Ala. 305, 23 Am. Rep. 552, did not refer to a notice given to any one at the maker's place of business. In addition to this there was evidence from which the court, acting as a jury, could find that Noble was the agent of defendant, with authority to receive notice.

As to the form of the notice, no particular form is required. "All that is necessary is that . . . the party liable and intended to be charged should be apprised of the dishonor and that he is looked to for payment." Martin, Dumee & Co. v. Brown, Shipley & Co., supra. Taking the notice and the reply together, it was open to the judge to infer that it was understood by both parties that the note had been

Digitized by Google

dishonored and that the plaintiff looked to the indorser for payment, and hence that the notice was sufficient.

The only remaining contention is that the court erred in stating, in the judgment, that said indorser had waived the benefit of the exemption law as to personal property. The note contains, in the face of it, this clause: "And as a part of the consideration of this note, we each, whether maker or indorser, agree and hereby waive all right to have any of our personal property exempted from levy and sale under legal process for collection of this debt, whether under the laws of Alabama or any other State in the Union." But the indorsement was simply by signing the name, without any such statement. The law is clear that the indorsement is a separate and independent contract, and that the only contract of the indorser is, "first, that it [the note] shall be paid on due presentment and notice of dishonor; second, that the instrument and the signatures of all prior parties upon it are genuine; third, that the instrument is valid according to its purport; fourth, that the parties to it are competent to contract; and fifth, that the indorser himself has the title to the paper and the right to transfer it." Jordan v. Long, 109 Ala. 414, 417, 19 So. 843, 844, and authorities cited.

Section 210 of the constitution of 1901 authorizes the right of exemption, as to personal property, to be waived by an instument in writing; and section 4232 of the Code of 1907 (section 2105, Code 1896) provides that "as to personal property the waiver may be made by separate instrument in writing subscribed by the party making the same, or it may be included in a bond, bill of exchange, promissory note, or other written contract executed by him." The only contract "executed" by the indorser is the simple indorsement, which has a certain definite meaning and certain limitations. He has not "executed" any writing whereby he has waived his exemption. The waiver of the exemptions is no part of the obligation of the note, but simply an additional agreement which the maker of the note makes. He cannot make it for the indorser, and the indorser cannot be held to have waived his exemption by implication. Both the constitution and the statute show a clear intention that the waiver must be in the writing which the party signs. The court therefore erred in holding that Scarbrough had waived his right of exemption.

The judgment of the court will be here corrected, by striking out the second paragraph, relating to waiver of exemptions, and, with said correction, the judgment of the court is affirmed.

Corrected and affirmed.

TYSON, C. J., DOWDELL and DENSON, JJ., concur.

Digitized by Google

Decision No. 1161.

DUGANE v. HVEZDA POKROKU No. 4.

(Supreme Court of Iowa. January 14, 1909.)

119 N. W. 141.

TRIAL — INSTRUCTION — NECESSITY — ISSUE NOT PRESENTED — APPEAL AND ERROR — HARMLESS ERROR — EXCLUSION OF TESTIMONY — EXAMINATION OF WITNESSES — LEADING QUESTIONS — NEW TRIAL — PRESENTATION OF CAUSE ON NEW THEORY — BILLS AND NOTES — ORDER TO PAY MONEY — INVALIDITY — NECESSITY OF ACCEPTANCE.

1. The jury need not be instructed with reference to an issue not presented.

2. Where an objection to the statement of a witness is sustained, and the witness subsequently makes the statement objected to, no complaint can be made of such ruling.

3. No prejudice resulted from excluding an answer to a question objected to as leading and suggestive; the ruling being followed by a recital of what was said and done, and the question being objectionable on another ground than that urged.

4. A new trial should not be granted merely to allow a party who has been defeated to present his cause on a new theory.

5. An order for the payment of money, addressed to no one in particular, but generally to any one for whom the maker might be employed or who owed him money, is too indefinite and uncertain to be binding on any one.

6. Action cannot be maintained on an unaccepted order.

Appeal from Superior Court, Cedar Rapids; J. H. Rothrock, Judge.

Action for insurance money alleged to have been assigned to plaintiff resulted in a verdict and judgment for the defendant. The plaintiff appeals. Affirmed.

H. G. Bowman, for appellant. Grosby & Fordyce, for appellee.

LADD, J. At the time of her death, July 26, 1906, Rose Fitzsimmons was a member of the order known as Hvezda Pokroku. It provided for the payment of an indemnity upon the death of its members and the husband of deceased, George Fitzsimmons, as beneficiary, became entitled to the sum of $200. About the 9th of October, 1896, he borrowed money of the plaintiff and signed a paper in words following, save the name at the top, and whether that was there is in dispute: "October 9, 1906. To Hvezda Pokroku No. 4, Cedar Rapids, Iowa, or any other person, firm, co-partnership, company, corporation, organization or official by whom I may now or hereafter be employed, or from whom I may have any money due or to become due, or any bank where I have money on deposit. On presentation of a copy of this power of attorney, duly verified, any time before the expiration of ten years from the date hereof, pay to the order of A. M. Dugane, for value received, one hundred sixty-eight and no-100 dollars, less the amount indorsed on the back hereof, with interest at 8 per cent. per annum, out of any money due me or to become due me after the presentation of a verified copy of this power of attorney.

Digitized by Google

I hereby irrevocably waive all exemptions or other rights I may have by reason of any law of any State in which I am now or may hereafter be employed or may live, and order such payment out of the first money to become due me; and hereby irrevocably constitute and appoint the holder hereof, his heirs, executors, administrators or assigns, my true and lawful attorney to receive, sue or receipt for any and all moneys that may be due to me. Giving and granting unto my said attorney, his heirs, executors, administrators or assigns, full power and authority to do each and every act or thing necessary or requisite to be done in the premises as fully to all intents and purposes as I might or could do if personally present at the doing thereof." A copy of this, with information of plaintiff's claim, was delivered to the president of the local lodge, but $160 of the indemnity thereafter was paid to Fitzsimmons and another creditor, and $40 retained by the officers to reimburse them for funeral expenses advanced. The only issue submitted to the jury was whether the words "Hvezda Pokroku, No. 4, Cedar Rapids, Iowa," had been written at the head of the order before Fitzsimmons signed it. The plaintiff and her husband testified that the address was there when signed, while Fitzsimmons denied this.

The issue as to authority, actual or implied, to fill a blank by inserting the name thereafter, was not presented, and there was no occasion to instruct the jury with reference thereto.

Some exceptions were taken to the rulings on the admissibility of evidence. If the court did not sustain an objection to plaintiff's agent saying what Fitzsimmons told him was due from defendant, the witness subsequently stated this. As the court held that defendant was charged with notice of plaintiff's claim, the testimony of defendant's secretary that she knew nothing of the order was without prejudice. Plaintiff as a witness was asked: "Did he (Fitzsimmons) authorize Dr. Dugane to put in the name Hvezda Pokroku No. 4?" An objection as leading and suggestive was sustained. As the ruling was followed by a recital of what was said and done, no prejudice could have resulted from excluding an answer to a question objectionable on another ground than that urged.

The basis for the petition for new trial on the ground of newly discovered evidence was a power of attorney subsequently found, in which Fitzsimmons appears to have authorized plaintiff's agent to fill in blanks in papers executed by him and assign his wages and credits due or to become due for ten years; but this instrument would have had no bearing had it been offered in evidence at the trial, for the contention of plaintiff was that the address had been written before the order was signed. A new trial will not be granted merely to allow a party who has been defeated to present his cause on a new theory. Chicago, Milwaukee & St. P. Ry. Co. v. Hemenway, 134 Iowa, 523, 111 N. W. 987.

Under the finding of the jury, the order was addressed to no one in particular, but generally to any one for whom plaintiff might be employed or who owed him money. This was too indefinite and uncertain to be binding on any one. Even if this were not so, there was no showing that defendant ever accepted the order, and, in the absence of acceptance, action could not be maintained against defendant. Poole v. Garhart, 71 Iowa, 37, 32 N. W. 16.

Digitized by Google

Decision No. 1162.

KENNY v. HARLEM SAVINGS BANK.

(City Court of New York, Trial Term. November, 1908.)

114 N. Y. Sup. 749.

BANKS AND BANKING — SAVINGS BANKS — PAYMENT OF DEPOSIT — PAYMENT OF FORGED DRAFTS — LOSS OF BOOK.

1. A by-law of a savings bank provided that payments to persons presenting a passbook issued by the bank should discharge the bank, though the bank would endeavor to prevent fraudulent payments. Held a contract by the bank to take ordinary care not to pay others than the depositor, but saving it harmless on payment of the deposit to one other than the person rightfully entitled thereto on presentation of the passbook.

2. Plaintiff, making a deposit in a savings bank, was at the time unable to write, but made his mark. Thereafter, having learned to write, he signed his name in the signature book, and brought action thereafter to recover moneys paid out on alleged forged drafts. It was conceded that plaintiff personally never drew any money, but he roomed with one who, from his intimate acquaintance with him, was able to answer all the identification questions asked by the bank's teller on presentation of the drafts. The teller testified that when a forged draft was paid the passbook was produced and a correct answer given to each of the questions, and there was nothing to arouse suspicion that the person presenting the passbook was not entitled to the same. Held, that the bank had fulfilled its obligation to exercise reasonable care to protect the depositor.

3. Where the bank book of a depositor in a savings bank has been stolen, it will not defeat an action by the depositor to recover a balance to his credit in the bank that he is unable to produce the bank, though there is a statutory requirement that no savings bank may make any payment except on production of the book.

Action by Owen Kenney against the Harlem Savings Bank. Verdict for plaintiff. Motion for new trial denied.

Edward Mandel (Samuel I. Frankenstein, of counsel), for plaintiff. Reuben Mapelsden (Herbert S. Ogden, of counsel), for defendant.

McAVOY, J. Owen Kenney, the plaintiff herein, was a depositor in the defendant bank. The bank in the regular course of business had issued to him, as is customary, a savings bank book; and, at the time of opening the account, being then unable to write his name, he answered various identification questions, subscribing thereto his mark in lieu of a signature. Thereafter, having learned to write, he signed his name in the signature book. It appeared that the extent of his knowledge of writing was limited to the mere ability to write the letters of his name. He had on deposit some $600, and it is conceded that he personally never drew any of the moneys paid out by the bank, and to recover which sums this action is brought. It seems that the plaintiff boarded with, and in fact was a countryman of, one Farley, whose acquaintance and intimacy with the plaintiff made him conversant with the answers to all of the identification questions asked by the bank teller, in case his suspicion was aroused by a change from the usual characteristics of Owen's signature. The paying teller testi-

Digitized by Google

fied that Kenney's signature varied at times; and this is reasonable and probable, because of the fact of his general inability to write, and the occasions of his writing being rather few.

Among the by-laws of the defendant bank, a copy of which was printed on the passbook and delivered to the plaintiff upon opening his account, is one reading as follows:

"Although the bank will endeavor to prevent frauds and impositions, yet all payments to persons presenting a passbook issued by it shall be valid payments to discharge the bank."

In effect, this provision was a contract with the plaintiff to take ordinary care not to pay to others than himself, but saving itself harmless in case the passbook, the indicia of ownership of the deposit, was produced by and paid upon to another than the one rightfully entitled thereto. The question, therefore, is whether the circumstances present a case in which it can be said, as matter of law, that the defendant exercised reasonable prudence, care, and oversight to prevent imposition upon it and loss of plaintiff's deposit. It seems to me that, in view of this provision of the by-law contained in the passbook delivered to plaintiff, of which he was aware, together with the fact that a variance in the signature of a person unaccustomed to write his name is not extraordinary, and the uncontradicted testimony of defendant's teller that, in each instance where a forged draft was paid, there was a production of the passbook and a correct answer given to each of the identification questions, and nothing else was called to the attention of the bank authorities to justify suspicion that possession of the passbook by the person presenting it was wrongful, the bank, in the exercise of such care as it was called upon to use, and in view of its business could use, for the protection of its depositors, was not called upon to do more.

It is a question of law for the court, in my opinion, whether or not the defendant failed to comply with the duty devolving upon it of exercising the reasonable care and diligence required to protect its depositors from fraud or larceny, where the proofs are conclusive and undisputed. It is the rule in this class of cases that, unless the force of the testimony with reference to compliance with the rules of the bank is impaired, rebutted, or destroyed, there is no possibility of any inference being drawn by a jury that the defendant violated the rule which required that, in paying over money to one in possession of the passbook, it exercise reasonable care and diligence. Wall v. Emigrant Industrial Savings Bank, 64 Hun, 252, 19 N. Y. Supp. 194.

The only question which, under any view of the facts, could possibly be for the jury, would be as to defendant's negligence in paying out upon these forged drafts eleven separate times. However this might be, I believe that the testimony of the plaintiff himself that he boarded and roomed with one Farley, who knew of his birthplace in Ireland, was in fact a fellow townsman, knew his parents' names, the surroundings of his home, and the usual knowledge a neighbor might acquire of another with whom he was intimate, supports a fair presumption that whatever negligence resulted in these fraudulent transactions was fairly attributable to the plaintiff in so carelessly guarding his passbook as to allow it to be taken, carried away, and used by one who might so easily make its possession effective to withdraw deposits.

I do not agree with defendant's contention that the complainant

Digitized by Google

should be dismissed because of failure to produce the passbook, since it is conceded that the same is not in the possession of the plaintiff, even though there is a stautory requirement that no savings bank may make any payment except upon production of such passbook. The absence of the passbook cannot be regarded as destroying plaintiff's right to the balance of the deposit; and I hold that the requirement of the banking law is not conclusive in an action brought to recover a deposit, when loss and ownership of original book are undisputed, although it may be available to defeat a demand at the bank.

I therefore direct a verdict for the balance of the deposit in favor of the plaintiff, and deny the motion to set such verdict aside, and also deny the motion for a new trial.

Motion denied.

Decision No. 1163.

MACAULAY v. HOLSTEN.

(Supreme Court, Trial Term, Kings County. January, 1909.)

114 N. Y. Supp. 611.

BILLS AND NOTES — ACCOMMODATION PAPER — LEGAL INCEPTION.

1. Accommodation paper has no legal inception until negotiated for value.

2. The taking of accommodation notes, either as conditional payment on an account or as collateral security for an antecedent indebtedness, is for value, where there is no fraudulent diversion of the notes from a restricted use imposed by the maker.

Action by Charles R. Macauley against George Holsten. Motion to set aside directed verdict for plaintiff denied.

Albert A. Hovell, for plaintiff.

Edward D. Brown, for defendant.

CARR, J. The whole question involved in this action is whether the plaintiff holds these two notes for value. The notes appear to have been made by the defendant, in favor of the payee, for the payee's accommodation. Accommodation paper never has legal inception until it is negotiated for value. The payee on the notes was indebted to the plaintiff on a running account, the last item of which antedated the notes several months. He took the notes from the payee, and credited him with the amount thereof, and deposited the notes in his own bank for collection. They came back unpaid, and he thereupon recharged the payee of the notes with the amounts thereof. Subsequently he took a confession of judgment from the payee of the notes for the whole amount of the running account, making no deduction for the amount of the notes.

The defense pleaded is simply that the paper was accommodation paper, to the knowledge or information of the plaintiff, and that he gave no value for the notes. The taking of these notes, either as conditional payment of or as collateral security for an antecedent indebtedness, would have been for value, unless there was a fraudulent diversion of the notes from a restricted use imposed by the maker. Grocers' Bank v. Penfield, 69 N. Y. 502, 25 Am. Rep. 231; Continental

Digitized by Google

Bank v. Townsend, 87 N. Y. 8. Of course, if there had been a fraudulent diversion of the notes, and they were negotiated either as collateral security for or conditional payment of an antecedent indebtedness, the holder would not be deemed to have taken for value. Phœnix Ins. Co. v. Church, 81 N. Y. 218, 37 Am. Rep. 494; Sutherland v. Mead, 80 App. Div. 103, 80 N. Y. Supp. 504. In the case at bar there is no pleaded defense of diversion of the notes, and that question is not in this case. In Roseman v. Mahony, 86 App. Div. 377, 83 N. Y. Supp. 749, the Appellate Division in this department seems to have declared a rule not in harmony with the earlier cases of Grocers' Bank v. Penfield and Continental Bank v. Townsend. At least such might be inferred from a reading of its opinion, as in that case there was no diversion of the notes. An examination of the record before that court on appeal discloses that these earlier authorities were not cited in the briefs of counsel; and it cannot be supposed, under such circumstances, that court meant to question the long-established rule.

The motion to set aside the verdict as directed for the plaintiff is therefore denied.

Decision No. 1164.

BUTCHER et al. v. BUTLER et al.

(Kansas City Court of Appeals. Missouri. October, 1908.)

BANKS AND BANKING — BANK AND DEPOSITOR — RELATION — INSOLVENCY — DISTRIBUTION OF ASSETS — GENERAL DEPOSITS — DEPOSITS — TRUST FUNDS — "SPECIAL DEPOSITS" — NATURE AND FORM.

1. A banker is guilty of no breach of trust or impropriety in using funds coming into his custody from general depositors, his relation to them being that of debtor and creditor, and in no sense that of trustee and cestui que trust.

2. In a distribution of the funds of an insolvent bank all general depositors should share equally.

3. A deposit of money in a bank by one who sustains fiduciary relations to the funds, and who deposits the money for the benefit of another with the knowledge of the banker, was not entitled to any priority at the distribution of the assets on the bank's insolvency, where there was no understanding that the deposit should be treated as a special deposit.

4. A general deposit is where the bank is given custody of the money deposited with the intention expressed or implied that the bank is not required to return the identical money, but only its equivalent; the legal title to the money in such cases passing to the bank.

5. A special deposit is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive back the identical thing deposited, in which case the title remains with the depositor, and, if the subject be money, the bank has no right to mingle it with other funds [citing Words & Phrases, vol. 7, p. 6574].

6. In the absence of proof to the contrary, a deposit in a bank is presumed to be general, and it devolves upon the party claiming the contrary to show that it was received by the bank with an express or clearly implied agreement that it should be kept separate from the other funds of the bank and the identical money or property be returned to the depositor.

Digitized by Google

7. Where money was deposited in a bank to secure payment of compensation under a well-drilling contract, and, while the depositor had no right to check against the deposit, there was no agreement that the money should be kept separate from the other funds of the bank, it was a general and not a special deposit, though the transaction was called a "trust fund account" on the bank's books, and hence, on the insolvency of the bank, the depositor was not entitled to a priority over general creditors.

Appeal from Circuit Court, Bates county; Chas. A. Denton, Judge.

Action by Win Butcher and another against William J. Butler, as receiver of the Bates National Bank and others. Judgment for plaintiffs, and defendants appeal. Reversed.

John A. Eaton, E. H. McVey, and W. O. Jackson, for appellants. Thos. J. Smith and Silvers & Silvers, for respondents.

JOHNSON, J. Action in equity to obtain a preference over the general creditors of the insolvent estate of the Bates National Bank. Plaintiff prevailed in the trial court, and the cause is here on the appeal of defendants.

June 25, 1906, L. C. Martin and plaintiff B. T. Becker of Nevada, Mo., entered into a written contract with plaintiff William Butcher of Mound City, Kan., by the terms of which Butcher was to drill a certain well for Martin and Becker near Butler, Mo. To secure the payment to Butcher of the agreed consideration for his performance of the contract, it was agreed in that instrument: "Said first party (meaning Becker) agrees to deposit one thousand dollars in the Bates National Bank at Butler, Mo., as a guarantee of its part for the use of said second party (Butcher) for such drilling, . . . payment to be made to said second party as follows: Each well to be paid for when it is completed and capped or when drilling is stopped." The contract was deposited by the parties with the cashier of the Bates National Bank on the date of its execution, and at the same time Becker deposited two checks, one for $1,000, drawn by him on a Wisconsin bank, and the other for $500, drawn on a bank in Nevada. A general account was opened by the bank with Becker in which the amounts of these checks were treated as so much money placed to the credit of the depositor. In due time the checks were collected by the bank. Afterward Becker was charged in this account with the following item: "Trust fund, June 29, $1,000." The cashier testified concerning this item that on discovering that Mr. Becker, if he chose, might exhaust the account by checking against it, since it was a general account, Mr. Butcher demanded that the said sum of $1,000 be placed by Becker in the bank in a way that would not subject it to the payment of his individual checks, and to this end caused Becker to write the following letter to the bank: "Butler, Mo., June 29, 1906. The Bates National Bank, Butler, Mo. — Gentlemen: You will please reserve $1,000.00 of my account until the test well I am about to have drilled in or near Butler is down 1,000 feet unless gas be found at a less depth after completion of the well, or when it will have been drilled to a depth of 1,000 feet. Mr. Win Butcher is to be paid in full his account against myself and L. C. Martin." Acting on the instructions contained in this letter, the cashier made out and handed to the bookkeeper a deposit slip as follows: "Trust fund by T. B. Becker

Digitized by Google

. . . checks as follows: $1,000.00. To be paid to Butcher when he shall have put his drill down 1,000 feet. $1,000."

We quote from the testimony of the cashier relative to this account.

Direct examination: "Q. That memorandum was for the information of your bookkeeper? A. Yes, sir; or anybody else that might — Q. It never was given to anybody else, just kept in the bank? A. Yes, sir; it is for the purpose of showing how that money is to be disposed of. Before that it was to the credit of Mr. Becker. He could check it out. After that it wasn't to his credit. He couldn't check nor nobody else could until the contract which it referred to was complied with. Q. You may explain to the court that trust fund account. A. Well, judge, the trust fund account, it is just the same as any other individual account in the bank; that is, it is to be, it is counted one of the accounts and in the bank, but the difference between that and every other man's account is that every deposit that is made there has a memorandum to explain what is to be done with their money. Of course, if you deposit money to your own credit, there is no explanation of that, you check it out whenever you get ready, or anybody else; but the trust fund, we have an account called the trust fund, for the purpose of taking care of anything that might be deposited for a different purpose to the ordinary ways of depositing money. If you put the money there for your own credit, you might say, 'pay John Smith,' if you wanted to, and that would be all there would be about that; but, if it had to be determined by something hereafter, we would put it in the trust fund, and mark on that ticket what had to be done. So in this case it says, 'See contract,' and the contract decides what is to be done with that money; that is, the trust fund account, just an account for taking care of things that individuals might want to put up there with a memorandum of what is to be done about it hereafter, and that is what that is, and that contract there is the memorandum in this case, but we done that with every individual that done that. With every two men that come in there and wanted to make some definite agreement, we would have to have some kind of way of disposing of their money, put in there for that purpose, and that is the way we had. . . . My understanding is that Butcher, that Becker, Martin and Becker are one man, practically one man, and Butcher is the other fellow, and my idea was all the time that whenever Becker, who furnished the money, agreed with Butcher that Butcher should have it, then Butcher would get it. That was my idea, and I think that was what the contract said."

Cross-examination: "Q. Mr. Clark, the fact of the thing is like this, then: That at the time the $1,000 was put in there the understanding and agreement was it was put there for the purpose of being held by the bank to pay Butcher when he complied with the contract? A. I think that was the understanding. Q. And the bank or the officials or clerks of the bank had on file a certificate something like that, and it said B. T. Becker account? A. Yes, sir. Q. The bookkeeper, when he goes over the files at night, posted up his books at night from the files, or, when he did that, he entered this $1,000 to the B. T. Becker individual account? A. Yes, sir. Q. That then Mr. Butcher got to talking with you and called your attention to the fact that Mr. Becker could draw that money out if he wanted to? A Very likely. Q. And then

Digitized by Google

wanted to keep it so Becker could not draw it out, and, for the purpose of carrying out the original intention, you changed it over to the trust fund? A. Yes, sir."

There is nothing in evidence to show that the particular $1,000 placed to the trust fund account was to be kept separate from the other funds in the bank. It was not so segregated, but was treated by the officers of the bank as were the moneys received from other depositors. In September of that year the bank went into liquidation, and a receiver of its assets was appointed by the Comptroller of the Currency of the United States. Butcher and Becker had a lawsuit over the drilling of the well which resulted in a judgment in favor of Butcher for about $250. Afterward they joined as plaintiffs in the bringing of this suit. In the judgment entered the court found "that on June 25, 1906, plaintiff B. T. Becker deposited with said bank the sum of $1,000 as a special deposit and trust fund, to be held by said bank for the special purpose of paying the same to plaintiff Win Butcher upon the Compliance on the part of Win Butcher with a certain contract between said Becker and one L. C. Martin on the one part, Win Butcher on the other, which said contract was at the time of such deposit deposited with said defendant bank in connection with the deposit of $1,000 aforesaid; that said defendant Bates National Bank took and received said $1,000 as a special deposit and trust fund under the contract and terms aforesaid." Other facts appear in the record, but those stated are all that need be considered.

The trade of a banker is to receive money and use it for profit. He is guilty of no breach of trust or impropriety in thus employing the funds coming into his custody from general depositors, and his relation to them in no sense is to be treated as that of trustee and cestui que trust, but is that of debtor and creditor. Consequently, in the distribution of the funds of an insolvent bank, all general depositors stand upon one ground. None is entitled to any preference or priority over others. This rule applies to a deposit made by one who sustains fiduciary relations to the funds, and this, too, where the deposit is received with knowledge on the part of the banker of the existence of such relation, but without an understanding that the bank is to treat the funds as a special deposit. Such was the view entertained by the Supreme Court in Paul v. Draper, 158 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296, where it was said: "The fact that the deposit was of a trust fund, and known to the bank to be such, would not of itself make the bank a trustee of the fund for the benefit of the cestui que trust. In order to have that effect, there must have been something in the circumstances of the deposit to constitute it a special, as contradistinguished from a general, deposit, into which two classes all deposits in commercial banks may be divided. If the deposit belonged to the former class, the fiduciary relation might well arise; if to the latter, in the absence of mala fides, it could not do so, for by a general deposit in good faith the title to the fund deposited passed. The bank became the owner thereof. The relation of debtor and creditor, and not that of trustee and cestui que trust, was created." A general deposit is where the bank is given custody of the money deposited with the intention expressed or implied that the bank is not to be required to return the identical money, but only its equivalent. In such cases

Digitized by Google

the legal title to the money passes to the bank, and the depositor divested of his title must rely on the obligation of the bank to repay him. In the case of a special deposit the bank merely assumes charge and custody of the property without authority to use it and the depositor is entitled to receive back the identical thing deposited. The title remains with the depositor, and, if the subject be money, the bank has no right to mingle it with other funds. Alston v. State, 92 Ala. 124, 9 South. 732, 13 L. R. A. 659; Morse on Banks & Banking (4th ed.) § 183 et seq.; 7 Words & Phrases Judicially Defined, § 6574, and cases cited.

In the absence of proof to the contrary, a deposit is presumed to be general, and it devolves on the party who claims it is not to show that it was received by the bank with the agreement, expressed or clearly implied, that it should be kept separate from the other funds of the bank, and the identical money returned to the depositor. The deposit under consideration, we think, was general, not special. There was no intention or thought entertained by Becker, Butcher, or the bank that the funds deposited were to be kept separate and the bank deprived of their use. It was the idea to put the money beyond the control of the depositor Becker to protect the contingent interest in it given to Butcher by the contract, but, when the time should come for the money to be paid out, the obligation of the bank was to make the payment out of its general funds, and not to return the identical money. The legal title thus was vested in the bank, and it was guilty of no wrong in commingling that money with its other money.

The facts that the bank was to recognize Butcher as the owner of the beneficial interest in the deposit only on the happening of a certain event, and that until then Becker should have no control over the deposit did not alter the character of the bank's relation to the deposit. In making it in the manner he did, Becker was acting both for himself and as the agent of Butcher to the extent of the contingent interest the latter had in the money. The bank became the debtor of both parties, was bound to pay the money out at any time on their joint check, and, until the occurrence of the determinative event, was not entitled to honor the individual check of either. This arrangement did not constitute the bank a technical trustee of the deposit. Such transactions are common in banking, and our attention has not been called to any principle which sustains the contention that restrictions of such nature on the drawing out of a deposit are sufficient in themselves to deprive the bank of the use of the money deposited.

There is nothing to change our conclusion that this was a general deposit in the fact that the bank entered the transaction on its books in what it called "a trust fund account." That was a mere name used in bookkeeping, and, while its use has some evidentiary significance, it is not conclusive of the question of whether the account was general or special and is overborne by facts and circumstances of overwhelming weight which show that the deposit was intended to be general.

The judgment is reversed. All concur.

Digitized by Google

Decision No. 1165.

FIRST NAT. BANK OF OWENTON v. GREENE et al.
(Three cases.)

Court of Appeals of Kentucky. December 16, 1908.)

114 S. W. 322.

BANKS AND BANKING — DEPOSITS — APPLICATION OF WARDS' FUNDS TO DEBTS DUE BANK FROM GUARDIAN — PARENT AND CHILD — SUPPORT OF CHILD.

1. Where a bank had credited money of wards to the individual account of the guardian, and knew what portion of the funds credited to the guardian belonged to the wards, it could not escape liability for misappropriating the wards' funds to an individual debt of the guardian because their funds were intermingled with hers.

2. Parents are legally bound to provide for the support of their children during their infancy, though the children have estates of their own, unless the parents have no means or their estate is limited, and the children have an income ample for their support.

3. Where a check for a ward's share of an estate was payable to both the ward and guardian, and the bank where it was deposited knew that the money was the ward's, it cannot be relieved from liability for applying the proceeds of the check to payment of a debt due it from the guardian individually.

Appeal from Circuit Court, Owen county.
"Not to be officially reported."

Actions by Margaret E. Greene and others, Annie May Greene and others, and John Howard Greene and others against the First National Bank of Owenton, Ky. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. B. Moody, Botts & Perry, and W. B. Lindsey, for appellant. Chas. Strother, for appellees.

NUNN, J. John W. Greene died several years since in Owen county, Ky. By his will he devised to his widow, who was his second wife, and his four children, one-fifth each of his real and personal estate. The child by his first wife was an adult and the three by his last wife were infants. R. C. Greene was the executor, and by the terms of the will John W. Greene's widow, Addie W. Greene, was permitted to and did qualify as the guardian of her three children without bond. The executor paid to her, as guardian for these children, several payments, altogether amounting to something near $2,600, and at the same time paid to her, her one-fifth interest. She deposited with appellant bank all these sums in her individual name. A considerable portion of the children's part she loaned, in her own name, to the adult heir referred to without security. After this she executed a mortgage for the benefit of her children on her real estate to secure $2,100 of the children's means which she had disposed of. She had also expended the balance of the $2,600. When the executor made his last settlement of the estate, he gave to her a check on appellant for $356.57 and a check for a like amount to each the three children. Just before these checks were written by the

Digitized by Google

cashier of appellant, Greene, the executor, had a private conversation with the cashier, in which Greene called his attention to the fact that the children's guardian, Addie W. Greene, had loaned to their half-brother the most of the money due them, and without requiring any security, and asked the cashier if he would not deposit the children's money in the bank and allow them interest. After the cashier consulted his assistant, he announced that this would be done. But, instead of doing this, their mother, the guardian, delivered the checks to the cashier, as the cashier testifies, with a request on her part that they be deposited to her individual credit. The mother testified, however, that she made no statement at the time as to whom the amounts of the checks should be credited. This money remained in appellant bank to the credit of the guardian for nearly ten months, when appellant, without the request or directions of any one, charged the guardian's account with two notes executed by F. C. Greene, the half-brother, and upon which the guardian had become surety. One of the notes was for something over $800, the other for something over $300, and this left a balance due, as shown by the bank books, the sum of $88, which was afterwards paid on a check of the guardian.

This action was brought by the children to recover from the bank the value of these checks, with interest, and the court on the trial sustained their claim. Appellant's cashier in his testimony did not contradict the facts related above; but testified, in addition, that he was acquainted with all the facts and circumstances connected with the estate of John W. Greene, with the children's interests in the estate, and that he knew that their mother was their guardian without bond, and that she and the executor, R. C. Greene, kept their accounts with the appellant bank. Appellant concedes that as a general rule it had no right to use the children's money in the payment of the guardian's personal debt to it; but claimed that the money of the children was so mixed and intermingled with the guardian's that it could not be known which was the children's money and which was hers, and therefore it had the right to charge her account with the notes referred to, as she was liable therefor. It is true that the money of the children was deposited to the individual credit of the guardian and their funds were intermingled with hers, but this was done by appellant, and it knew what portion of the money credited to the guardian belonged to the children, and it should not be allowed to escape, for the reason stated, its responsibility for the misappropriation of the children's funds.

Appellant further contends that the guardian did not owe her children the amount of these three checks; that in her settlement with the County Court she had failed to take credit for the sums she was entitled to for the support and education of the children. The testimony shows that, when she became guardian of the children, she was worth about $4,000, and that the children's portion of the estate was worth about $3,600; that the children were reasonably healthy and about able to support themselves; that she had consumed something over $600 of the principal of their estate and all the interest; and that she had not asked any further sum. The general principle is that parents are legally bound to provide for the support of their children during their infancy. This liability continues even though the children may have estates of their own. There

Digitized by Google

are, however, exceptions to this rule when the parents have no means or their estate is limited, and when the children have estate, the income of which is ample for their support. Reynolds' Adm'r v. Reynolds, 92 Ky. 556, 18 S. W. 517; Clement v. Hughes, 17 S. W. 285, 13 Ky. Law Rep. 352; Riley v. Riley, 11 Ky. Law Rep. 859; James v. Buchanan, 5 Ky. Law. Rep. 690.

Appellant claims that it should be relieved from the payment of the claim of Margaret Greene for the reason that, when the final settlement of R. C. Greene was made, the check was made payable to Addie W. Greene, guardian, and to Margaret Greene, and that Margaret Greene indorsed and delivered it to her mother, her guardian, and consented that she might deposit it to her individual credit. It is true the check was drawn as stated, but the testimony shows that this was done for the reason that the executor had some doubt as to whether or not Margaret was of age at that time, and it was drawn payable to both for his protection. The cashier of appellant knew this fact, and knew that the sum was due Margaret Greene and that no part of it was due the guardian; and both Margaret and her guardian contradict appellant upon the fact that Margaret consented that the check might be deposited to the individual credit of her guardian.

For these reasons, the judgment in each of the above styled cases is affirmed.

Decision No. 1166.

JOHNSON COUNTY SAVINGS BANK v. KEMP MERCANTILE COMPANY.

(Court of Civil Appeals of Texas. December 5, 1908.)

114 S. W. 402.

TRIAL — INSTRUCTIONS — SUPPORT BY EVIDENCE — BILLS AND NOTES — DEFENSES — FAILURE OF CONSIDERATION — TRANSFEREES BURDEN OF PROOF — SUBMISSION OF ISSUES — COURT'S DUTY — FRAUD.

1. An instruction not sustained by evidence is improper.

2. The burden is on the maker of a negotiable instrument to show that a transferee before maturity had notice of a failure of consideration for the instrument when he purchased it.

3. In an action on drafts by a transferee, it was improper to refuse to submit issues as to whether the drafts were procured through fraud, and whether they were fraudulently placed in circulation, where they presented the real defenses pleaded and were sustained by evidence.

4. When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid value for it without notice of the fraud.

Appeal from Kaufman County Court; Thos. R. Bond, Judge.

Action by the Johnson County Savings Bank against the Kemp Mercantile Company. From a judgment of the County Court for

Digitized by Google

defendant on appeal from justice court, plaintiff appeals. Reversed and remanded.

This suit was originally instituted in the justice court of precinct No. 7, of Kaufman county, Tex., on two drafts for $74.40 each, alleged to have been transferred and delivered to the Johnson County Savings Bank by a special written transfer on the backs of said drafts as an innocent purchaser before maturity for a valuable consideration in the usual course of business by the American Jobbing Association, the payee in the said two drafts. Appellee, the defendant in the court below, answered under oath that said acceptances were procured through the fraud of the said the American Jobbing Association, and were wrongfully and fraudulently put in circulation by it. In the County Court the appellee filed an amended answer which was properly verified, which said answer set out fully the fraudulent procurement and circulation by the American Jobbing Association of said bills of exchange. Appellee further plead that the alleged transfer of said bills of exchange was not real, but was fraudulent and simulated. Appellee also plead failure of consideration. The cause was tried before a jury, and judgment rendered against the Johnson County Savings Bank, and in favor of the Kemp Mercantile Company, from which judgment the Johnson County Savings Bank prosecutes this appeal.

Joel R. Bond, for appellant. Young & Adams, for appellee.

BOOKHOUT, J. (after stating the facts as above). The trial court only submitted to the jury the issue of the failure of consideration of the drafts sued on. The court did not submit the issue of fraud in the procurement of and putting the drafts in circulation. The court charged the jury as follows: "If you should find from the evidence, and of this the burden is upon the defendant to so prove, that the consideration for which said drafts were executed has failed as alleged, and that the alleged transfer of the said drafts by the American Jobbing Association to plaintiff is simulated or no value paid therefor for such alleged transfer of said drafts, then in that event, you will find for the defendant, and so say by your verdict." This charge was error. The evidence did not authorize the giving of same. The evidence did not show that the transfer of the notes to appellant was simulated or without consideration. The transfer on the drafts reads: "Pay to the order of Johnson County Sav. Bank, Iowa City, Iowa. [Signed] C. H. Dayton, Mgr."—and seems to have been made before the maturity of the instruments. The drafts on their face showed that they were negotiable. In order to defeat a recovery on a negotiable instrument transferred before its maturity on the ground that the consideration of the same has failed, the evidence must show that the transferee had notice of such failure when he purchased the same. The burden of showing this fact is on the maker of the instrument. Gill v. First Nat. Bank, (Tex. Civ. App.) 61 S. W. 146; Herman v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632; McAlpin v. Finch, 18 Tex. 833.

The court did not submit the issues as to whether the drafts were procured through the fraud of the payee therein, and whether they were fraudulently put in circulation. These were the real defenses pleaded, and appellee requested special charges seeking to

Digitized by Google

have these issues submitted to the jury. The evidence, we think, was sufficient to raise these issues, and the court should have submitted the same. When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid value for it without notice of the fraud. Hart v. West, 91 Tex. 184, 42 S. W. 544; Mulberger v. Morgan, (Tex. Civ. App.) 47 S. W. 738.

The judgment is reversed and the cause remanded.

Decision No. 1167.

BECKER v. HART et al.

(Supreme Court, Appellate Division, Second Department. December 30, 1908.)

113 N. Y. Supp. 1053.

EVIDENCE — WEIGHT AND SUFFICIENCY — CONCLUSIVENESS ON PARTY INTRODUCING EVIDENCE — TRIAL — QUESTIONS OF LAW OR FACT — WITNESSES — CREDIBILITY — BILLS AND NOTES — PAYMENTS AFTER TRANSFER.

1. A party calling a witness vouches for his general credibility, and not merely as to the matter concerning which he inquires.

2. Where plaintiff and her son were called by defendants and testified on cross-examination that plaintiff was a bona fide holder of the note sued on, the court was not required to submit plaintiff's status to the jury because she and her son were interested witnesses.

3. Where defendant made payments on a note to L. after he had transferred the note to a bona fide holder for value before maturity, and without insisting on L.'s production thereof or some proof that he was still the holder, they were not entitled to credit for such payments as against the holder.

Appeal from Trial Term, Queens County.

Action by Josephine Becker against Frieda Hart and another. From a judgment for plaintiff and from an order denying a new trial, defendants appeal. Affirmed.

Argued before WOODWARD, JENKS, HOOKER, GAYNOR, and RICH, JJ.

Wm. Victor Goldberg, for appellants.
Abr. A. Silberberg, for respondent.

JENKS, J. This is an appeal by the defendants from a judgment entered upon a directed verdict for the plaintiff in her action against the makers of a promissory note. The plaintiff alleged that she was a bona fide holder for value before maturity. The defendants admitted the making, indorsement, and delivery of the note, but denied that allegation of the plaintiff and pleaded payment. The defendants, taking the affirmative, attempted to show that the note came lawfully into the hands of Levy, to whom they paid the note, and that the note was abstracted from the possession of Levy, who is dead, by his employee, and given to the latter's mother, this plaintiff.

Digitized by Google

The defendants insist that the learned court erred in its refusal to submit to the jury the question of the status of the plaintiff, for the reason that it was established, if at all, solely by the testimony of the plaintiff and her son (of whom both were interested witnesses), and the proposition is that the credibility of such testimony must have been submitted to the jury. I think, that, if this testimony had been adduced by the plaintiff and her son as witnesses for the plaintiff, the court should have submitted the question to the jury under the rule as stated and limited in Hull v. Littauer, 162 N. Y. 569, 57 N. E. 102, and Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949. But both witnesses were called by the defendants, who therefore cannot now contend that the credibility of such witnesses must have been submitted to the jury. Hamilton v. Forsyth, 77 Hun, 578, 28 N. Y. Supp. 1016; Hankinson v. Vantine, 152 N. Y. 20, 27, 46 N. E. 292. I think that the application of this rule is not affected by the fact that the testimony as to the time of the acquisition of the note was first elicited upon the cross-examination of the witnesses. I think that the party who calls a witness vouches for his credibility in general, and not as to the matters as to which he alone makes injury. Wigmore on Evidence, p. 1041, says:

"The guaranty of credibility (if there is one at all) must relate to the witness's general personal trustworthiness of disposition and emotion, not to the correctness of specific statements of fact; since the latter, as is universally conceded (ante, § 907), may always be shown to be untrue. The guarantee is of the continuing, single quality of trustworthiness, and is therefore inseparable; it either is made or is not made, and it cannot be construed as existing for some statements and not for others."

Although the defendants gave testimony tending to show payments to Levy to be applied upon the note, it also appeared from their testimony that Levy did not produce the note on the occasions of payment, but said that he had mislaid it, that he could not find it, that he would hunt for it and produce it, but that he never did so. When the court directed the verdict, there was before it the testimony of the plaintiff and her son, both witnesses called by the defendants, that the son came to the mother shortly after the making of the note and said that her employer, Levy, would sell the note for $1,000, which was then paid by the plaintiff to her son, who gave the money to Levy, but transferred the note to the plaintiff, who has ever since been the holder thereof. The court was not required to present the question of payment to the jury, inasmuch as the contention was that these payments were made to Levy as the owner of the note (not as the representative of the plaintiff), without any proof tending to show that he was then the holder thereof, and there is no proof that the moneys thus paid ever came into the hands of the plaintiff. If the testimony of the plaintiff and her son were true, then the payments, if made, were made to Levy after he had parted with the note to a bona fide holder for value and before maturity. The defendants may suffer in that they did not protect themselves by insisting upon the production of the note, or by some proof that Levy was then the holder thereof, but that is their fault.

I think that the judgment must be affirmed, with costs.

All concur; GAYNOR, J., in separate memorandum.

Digitized by Google

GAYNOR, J. (concurring). The plaintiff made out a case by putting the note in evidence. The burden was on the defendants to prove their pleaded defense that they had paid the note to the prior holder, and that the plaintiff received the note of him with knowledge of such payment. As no evidence thereof was given the plaintiff was entitled to a verdict. There was no question of credibility of any witness in the case; and I do not feel ready to assent to the proposition, not involved in the case, that simply because a party calls the adverse party, or an interested, hostile or biased witness, he thereby takes away from the jury the question of what, if any, credence or weight is to be given to the evidence of such adverse party or witness. By calling a witness a party vouches for his character to this extent only, viz., that he is not permitted to impeach him, as by showing that he has committed crimes, or by calling witnesses to blacken him as of a generally bad character, but he is entirely free to question the truth or credibility of his evidence. Clancy v. N. Y., N. H. & H. R. Co., 128 App. Div. 141, 112 N. Y. Supp. 541. I am aware that loose and inadvertent expressions to the contrary are to be found, but importance should not be attached to them, and especially by a court like this.

Decision No. 1168.

STIRES et al. v. FIRST NATIONAL BANK OF COLUMBUS.

(Supreme Court of Nebraska. January 9, 1909.)

119 N. W. 258.

BANKRUPTCY — DIVIDENDS — PERSONS ENTITLED.

1. A contract between two creditors of a common debtor, wherein one agrees that a debt owing to a third creditor may be preferred by the debtor, if purchased by the other contracting creditor, does not amount to an assignment of the first party's debt, nor of dividends declared thereon in subsequent bankruptcy proceedings.

2. A note pledged by a third party as security for the payment of a debt stands in the position of a surety for the payment of the principal debt, and funds paid upon the pledged note will be applied upon the debt secured.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 1. Appeal from District Court, Platte County; Hollenbeck, Judge.

Interpleader by the State Bank of Columbus against the First National Bank of Columbus, in an action instituted by J. Dayton Stires, trustee in bankruptcy of the estate of Garrett Hulst. Judgment for the First National Bank, and the State Bank appeals. Reversed and remanded, with instructions.

Edson Rich and Albert & Wagner, for appellant. A. M. Post, for appellees.

EPPERSON, C. The parties to this appeal are interpleaders in an action instituted in the court below by J. Dayton Stires, trustee in bankruptcy of the estate of Garrett Hulst. The funds in controversy are dividends which the trustee has collected, and which were de-

Digitized by Google

clared upon the claim of the appellant as a creditor of the bankrupt. The material facts may be stated, in substance, as follows: On June 15, 1904, Garrett Hulst was in the merchandise business in Columbus, and owned a large stock of goods. His four principal creditors, and the amounts owing to each on their respective notes, as subsequently allowed, are as follows: The Hundley Smith Dry Goods Company, $11,560.41; First National Bank of Columbus, $7,130.50; the State Bank of Columbus, $10,995.98; and Lucy Hulst, $12,724. Early in 1904 Lucy Hulst, who is the mother of the bankrupt, pledged her note to the Hundley Smith Company as security for its indebtedness against Hulst. On June 15, 1904, the Hundley Smith Company was pressing its claim and threatening to institute bankruptcy proceedings to enforce its payment. The two banks, in order to prevent such proceedings, entered into a written agreement of which the following is a copy: "In consideration of the purchase by the undersigned, the Columbus State Bank, of a certain note and account owing by Garrett Hulst to the Hundley Smith Dry Goods Company amounting in the aggregate to the sum of $11,160.47 exclusive of interest, and the extension of time for payment of said claim and any and all other indebtedness owing by said Hulst to said bank, to the end that said Hulst may continue his business and avoid the cost to all creditors which would follow the institution of proceedings in bankruptcy against said Hulst now threatened by said Hundley Smith Dry Goods Company, the undersigned, the First National Bank of Columbus, hereby agrees that all money, the proceeds of the business of said Hulst, less necessary expenses and money owing by him for goods heretofore purchased and such as many hereafter be necessary to supply current needs shall be paid by said Hulst to the Columbus State Bank and credited by it upon the debt so purchased from the Hundley Smith Dry Goods Company until payment of such debt in full, and upon payment of the debt last above mentioned the money applicable upon the claims of either party hereto shall be applied pro rata upon the respective claims of the respective banks and of Mrs. Lucy Hulst." Hulst consented to the arrangements thus made by the banks. The State Bank paid the claim of the Hundley Smith Company, and received an assignment thereof, together with the Lucy Hulst note. Soon after the execution of the above agreement by the banks, Hulst assigned to the State Bank certain book accounts, and Lucy Hulst made an assignment to the State Bank of her note against Hulst, pledging the same again as security for the debt assigned to said bank by the Hundley Smith Company, and further pledged the same to secure the original indebtedness owing by Hulst to said bank. Hulst did not pay any part of the Hundley Smith claim. In October following Hulst was declared a bankrupt, and his estate has been fully administered by the trustee. In the bankruptcy court the National Bank filed its claim, and the State Bank its original claim, also the note bought of the Hundley Smith Company, and the pledged note of Lucy Hulst. All these claims were allowed as liabilities of the estate. The trustee realized 42.36 per cent of the indebtedness. Prima facie the National Bank is entitled to the dividends, amounting to $3,020.49 payable upon its note. The State Bank contends that under and by virtue of the above contract it is entitled to apply the dividends declared upon the National Bank's note to the payment of the claim bought of the Hundley Smith Com-

Digitized by Google

pany, or so much thereof as will be sufficient, with the dividends declared upon the Hundley Smith claim itself and the original claim of the State Bank, to satisfy it, and further that the dividends upon the Lucy Hulst note are not applicable upon the Hundley Smith claim. The lower court found for the State Bank, and the National Bank appeals.

Appellee's argument does not appeal to us as a proper disposition of this case. Appellant did not by the contract assign or pledge its note to the appellee, nor the dividends which might thereafter be declared in the bankruptcy proceedings. At most the contract was only an agreement on the part of the appellant that the debtor Hulst might prefer the claim assigned to the appellee by the Hundley Smith Company, or that from the proceeds of Hulst's business that claim should be first paid. The contract was not made in contemplation of Hulst's bankruptcy, but quite the contrary. It contemplated that bankruptcy proceedings should not be instituted, and that Hulst would be able to pay out if not pressed by the Hundley Smith Company. Lucy Hulst had no property but her son's note. It was not desirable security, except in the event that it should become collectible. The contract contemplated that the indebtedness owing to the Hundley Smith Company should be paid before any of the funds apparently available should be paid to any of the other three principal creditors. The Lucy Hulst note stood pledged as security for the Hundley Smith claim, and by the assignment of that claim to the appellee it became a security in the hands of the latter for the payment of the Hundley Smith note. It is immaterial, so far as our inquiry is concerned, that it was later pledged also as security for the original claim of the appellee. When the contract was made the Lucy Hulst note was apparently without value as security, but when any amount thereof became collectible, it was of value, and the amount paid thereon was applicable upon the debt which it was first pledged to secure. The appellant, by agreeing that the Hundley Smith claim should be preferred, became interested in seeing that all funds available for its payment were applied thereon.

The appellee asserts as the essential provision of the contract that portion thereof which provides that, upon the payment of the Hundley Smith claim, "the money applicable upon the claim of either party hereto shall be applied pro rata upon the respective claims of the respective banks and of Mrs. Lucy Hulst." The lower court found that after the payment of the Hundley Smith claim the amount of dividends declared upon the claim of the National Bank and the original claim of the State Bank should be paid pro rata upon these two debts and the note of Lucy Hulst, and this without regard to the dividends payable upon the Lucy Hulst note. We cannot find any law, equity, or justice in such a distribution. The contract did not release Hulst nor his bankrupt estate from paying the Lucy Hulst note. It did not release it as security for the payment of the Hundley Smith claim. Although the contract did not contemplate that the Lucy Hulst note would be paid until after the terms of the contract had been complied with, yet it did not stipulate to the contrary. It is apparent that the banks intended by this clause of their contract that neither should attempt to procure a preference over the other or over Lucy Hulst, but that the funds available, after the payment of the Hundley Smith claim, should be paid pro rata upon the three

Digitized by Google

remaining principal claims. Had the Hundley Smith claim been secured by collateral not pertaining to Hulst's business, it could not be said that the State Bank could discard the same, or appropriate it to the payment of other indebtedness, simply because the contract contemplated that the principal indebtedness would be paid by the principal debtor, and that occasion would not require the enforcing of the securities. Parties are entitled to all the benefits of their contract although when made they were apparently of little or no value. The contract entered into was made with reference to the fact that the Lucy Hulst note was pledged as security for the Hundley Smith claim, and the parties are entitled to the benefits derived from such security. To permit the State Bank to apply the proceeds thereof upon their original indebtedness by reason of the subsequent pledge therefor would be to enforce against the National Bank a contract to which it was not a party.

As contended for by appellant, the Lucy Hulst note stood in the position of surety for the payment of the Hundley Smith claim, and as such the dividends paid thereon must be applied. But appellee contends that appellant is foreclosed of this contention because inconsistent with its answer in the court below. There appellant did allege that the contract was rendered inoperative by reason of Hulst's disposition of his business and subsequent bankruptcy. Possibly the case might well be disposed of along the line suggested by the answer, but we do not so decide. The facts were set forth in the pleadings, and the appellant claimed the amount declared as a dividend upon its note. Prima facie it was entitled to it. Under these circumstances inconsistency in pleading or a change of theories is not very damaging. Appellee must rely upon the strength of his own case, and not upon the inconsistencies of an adversary so strongly fortified.

The amount collected by the State Bank from the book accounts, and the dividends upon the Hundley Smith and Lucy Hulst notes, were sufficient to pay the Hundley Smith claim in full. With this appellee must rest content.

We recommend that the judgment of the lower court be reversed, and this cause remanded that judgment may be entered conforming to this opinion.

DUFFIE and GOODE, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion this cause is reversed and remanded, with instructions to the lower court to enter judgment conforming thereto.

Digitized by Google

Decision No. 1169.

HERMANN'S EX'R v. GREGORY et al.

(Court of Appeals of Kentucky. February 4, 1909.)

115 S. W. 809.

BILLS AND NOTES — SIGNATURE IN BLANK — LIABILITY — CONSIDERATION — STATUTES — "VALUABLE CONSIDERATION" — "HOLDERS FOR VALUE."

1. Under the common-law rule in Kentucky, one signing his name to a blank note and delivering it to another to be used to raise money is responsible for whatever sum the latter inserts in the body of the note.

2. Where payees of a note, on receiving it, paid a specified sum to banks, which the maker owed, there was a valuable consideration for the note, within Negotiable Instruments Law (Acts 1904, p. 220, c. 102), § 25, providing that an antecedent debt constitutes value.

3. A payee of a note, who on receiving it paid a specified sum to banks, which the maker owed, is a holder for value within Negotiable Instruments Law (Acts 1904, p. 220, c. 102), § 26, providing that, where value has been given for the instrument, the holder is a holder for value.

4. G., P., and B. bought property and gave their joint notes for the price; each to be liable for one-third thereof. B. was unable to pay, and G. and P. agreed to pay his share on B. securing them by a note with a third person as surety. B. procured the third person's signature to a blank note on the understanding that he would use it to borrow money. B. filled in the blanks, signed it as maker, and delivered it to G. and P., who paid B.'s share. Held, that the note was used for the purpose for which the third person signed it, and he was liable as surety.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by Dudley Gregory and another against Magdalena Hermann, revived after her death against her executor. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. M. Smith, for appellant. Gibson, Marshall & Gibson and Newton G. Rogers, for appellees.

BARKER, J. The appellees (plaintiffs below) instituted this action in the Jefferson Circuit Court to recover judgment on a note against Peter Bitzer and Magdalena Hermann. Magdalena Hermann filed an answer pleading non est factum. Bitzer filed a separate answer pleading his discharge in bankruptcy as a bar to the debt sued for. Issue was joined on the plea of Magdalena Hermann, and the case was heard by the trial court on the law and the facts; a jury being waived by the parties. The court filed a written statement of the facts ascertained by him from the evidence and his conclusion of law thereupon. These are as follows:

"The plaintiffs Dudley Gregory and W. T. Pyne and the defendant Peter Bitzer bought a brickyard and executed their joint notes for the purchase money. These notes were held by the Louisville

Digitized by Google

National Banking Company, and there was another note of Bitzer's for $1,200, but upon which Gregory and Pyne were also bound, held by the First National Bank of Louisville. These notes had been renewed from time to time, and when the banks finally insisted upon payment Bitzer was not able to pay his part, and suits were brought and judgment rendered upon most of them. Bitzer was in business and was anxious for further time in which to pay his part of these debts. He asked Gregory and Pyne to pay the debts and promised that if they would do so he would secure them for the payment of his proportion by giving them a note payable in six months with his mother-in-law, Magdalena Hermann, as surety. They agreed to this, after ascertaining that Mrs. Hermann was solvent. Bitzer's share of the indebtedness was ascertained to be $5,009.71. On the 7th day of December, 1905, the plaintiffs and Bitzer met at the office of Gibson, Marshall & Gibson by agreement, and Bitzer produced a skeleton note with the name of Magdalena Hermann signed at the foot. Barrett Gibson, acting for the plaintiffs, filled in the note, and Bitzer signed it above the name of Mrs. Hermann, and Bitzer delivered the note so signed and filled in to the plaintiffs. The note then read as follows: '$5,009.71. Louisville, Ky., December 7, 1905. Six months after date we promise to pay to the order of Dudley Gregory and W. T. Pyne, five thousand and nine $^{71}/_{100}$ dollars with interest from date. Without defalcation, value received, negotiable and payable at the First National Bank of Louisville, Ky. Peter Bitzer. Magdalena Hermann.' The plaintiffs endeavored to discount this note, but were not able to do so, and they are now the holders and owners of it. They paid off the several judgments and debts, including Bitzer's part thereof, as they had agreed to do.

"Mrs. Hermann alleges in her answer that in December, 1905, prior to the 7th day thereof, Bitzer brought to her a blank note and asked her to sign it as his surety, saying he wanted to use it for the purpose of raising or borrowing money, that with the distinct understanding that the note was to be so used she signed it as surety, and that when the paper was presented to her it contained only this printed matter: '$———. Louisville, Ky., ———, 190—. ——— after date ——— promise to pay to the order of ——— dollars without defalcation, value received, negotiable and payable at.' She alleges that the note was diverted from the purpose for which she signed it, and that instead of using it to borrow money Bitzer used it to pay old debts then due for all of which the plaintiffs were bound with him. She pleads no consideration. Bitzer in his testimony says he did tell Mrs. Hermann that he intended to raise money on the note, and that she signed it with that understanding and for that purpose, but he admits that he did not tell plaintiffs that she signed for that purpose or upon any condition whatever. The plaintiffs did not know that she signed as surety for any other purpose than to enable Bitzer to carry out the arrangement he had made with him touching his pro rata of the debts. At the time of the trial Mrs. Hermann was too ill to testify in person or by deposition. Since the execution of the note sued on Bitzer has been adjudged a bankrupt and has secured his discharge.

"I conclude from these facts that as Bitzer produced to the plaintiffs a bank note with the signature of the person he promised to give as surety, and as he did not know the amount for which the

Digitized by Google

note was to be given when he obtained Mrs. Hermann's signature, and for that reason could not complete it before she signed, and as the plaintiffs did not know until after they had performed their part of their agreement with Bitzer by paying the debts, nor until the answer of Mrs. Hermann was filed, that there was any restriction upon her suretyship, if such was the fact, and furthermore that as Bitzer was present and produced the note for the purpose of having it filled in, Mrs. Hermann is bound by her signature. Sebree Deposit Bank v. Clark, 105 Ky. 214, 48 S. W. 1089. As to the plea of no consideration, Bitzer obtained six months' further time on his pro rata of the debts by reason of the execution of the note sued on, and that fact is a sufficient consideration to support the promise of the surety. Steger v. Jackson, 102 S. W. 329, 31 Ky. Law Rep. 434. For these reasons plaintiffs are entitled to judgment against the surety, Mrs. Hermann, as prayed, and it is so ordered."

After the judgment of the trial court was entered Magdalena Hermann died, whereupon, by consent, the action was revived in the name of her executor, who filed grounds for a new trial, which, being overruled by the court, this appeal is prosecuted here.

Appellant admits in his brief that his testator would have been liable on the note as the law stood prior to the adoption of the act of the General Assembly of the commonwealth of Kentucky, known as the "Negotiable Instruments Law" (Acts 1904, p. 213, c. 102), but insists, as the transaction involved herein arose subsequent to the adoption of the act in question, that his testator's liability is to be measured by the provisions of the new law, and that when so measured she is not responsible under the facts as found by the court. Appellant also concedes that, under the common-law rule prevailing in this State prior to the adoption of the Negotiable Instruments Act, if a party signed his name to a blank note and delivered it to another for the purpose of being used to raised money, the first is responsible for whatever sum the second inserts in the body of the note. Bank of Limestone v. Penick, 5 T. B. Mon. 25; Commonwealth Bank v. Curry, 2 Dana 142; Hall v. Commonwealth Bank, 5 Dana 258, 30 Am. Dec. 685; Smith v. Moberly, 10 B. Mon. 266, 52 Am. Dec. 543; Jones v. Shelbyville Fire, Life & Marine Ins. Co., 1 Metc. 58; Smith v. Lockridge, 8 Bush 423; Woolfolk v. Bank of America, 10 Bush 504; Sowder v. Citizens' National Bank, 12 Ky. Law Rep. 356; Stanley v. Davis, 107 S. W. 773, 32 Ky. Law Rep. 1135. But he earnestly insists that by section 14 of the Negotiable Instruments Law (Acts 1904, p. 217, c. 102) his testator, under the circumstances, is not liable on the note because it changes the former rule. Section 14 is as follows: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiable to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as

Digitized by Google

if it had been filled up strictly in accordance with the authority given and within a reasonable time." The particular part of the above section relied on is as follows: "In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time." Now, the contention of the appellant is that Bitzer carried the skeleton note with his mother-in-law's name appended thereto to the appellees, and it was there filled up in their presence, and therefore they were charged with notice of any secret understanding between him and his mother-in-law as to the use he was to make of the note to which she had affixed her name. It is said that the evidence shows that, when Bitzer applied to his mother-in-law to sign the note as his surety, he told her that he wished to raise money for his business, and that, this being true, the use of the note to pay off an old indebtedness was a diversion of it from the purposes for which the surety had signed the paper, and therefore the appellees, who were the original holders with notice and not for value, have no claim against the surety.

Without wholly giving our consent to the contention of appellant, let us see whether his testator's estate can escape liability under the rule as laid down by himself. In the first place, were the appellees holders for value? That the note was delivered to them is not questioned. Section 25 of the Negotiable Instuments Law is as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes a value, which is deemed such, whether the instrument is payable on demand or at a future time." It is admitted that the appellees paid for Bitzer, upon receiving the note, $5,000, which he owned the banks, and therefore, under the very language of the statute, there was a valuable consideration for the note. Section 26 of the act is as follows: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time." The appellees, after the signature by appellant's testator, as said before, paid off $5,000 of his debt. They are therefore, under the letter of the law, holders for value.

Now, what was the diversion which the appellant claims rendered the note invalid in the hands of the appellees? The facts are set up in Mr. Hermann's answer, and are as follows: "She says that said paper was signed by no one at the time the same was presented to her by her co-defendant, Peter Bitzer, and she says that her co-defendant, Peter Bitzer, stated and represented to her that he desired to borrow or raise some money and requested of her that she should sign her name to said note as his surety, and this defendant says that, as requested by her co-defendant, and as his surety, and with the distinct agreement and understanding that the same was to be used by her co-defendant, Peter Bitzer, for the purpose of borrowing money, she signed her name at the bottom of said note, and which note was blank as to the matters and in the particulars as hereinbefore set out at the time she signed the same, and there was no other signature signed or appended to said note. She says . . . she handed the same (the note) to her co-defendant, Peter Bitzer, who received it from her and afterwards and without her knowledge or consent had the same filled out as it now appears, and signed the same and de-

Digitized by Google

livered the same to the plaintiffs herein in settlement of or in consideration of a debt or obligation that was on and prior to the time that this defendant signed said note due and owing by her co-defendant to the plaintiffs herein, and she says that said note was not used by her co-defendant to borrow or raise money, nor was any money loaned or advanced by the plaintiffs herein or either of them on said note, and she says she received no part of the consideration for said note and is not in any way liable therefor." Now, it seems to us that what took place, as shown by the uncontradicted testimony, was exactly what Bitzer told his mother-in-law he was going to do with the note. He told her he wanted to borrow some money, and she signed the note to enable him to do this. He borrowed the money sued for from the appellees at the time the note was delivered to them. It is true, they did not hand him the bills in his own hands with which to go and pay his debts to the banks; but they did what was equal to that — they went to the banks and paid his indebtedness themselves. Now, while the joint indebtedness of appellees and Bitzer was owed by each of them in whole to the banks, as between themselves each was responsible only for one-third of it. Bitzer was an active business man, and was being sued by the banks for debts amounting in the aggregate to $15,000. If he could not meet this indebtedness, he was a bankrupt, and his business would stop. He was exceedingly anxious to go forward with his business obligations, with the hope of being able to weather the financial storm with which he was threatened and to pay all of his indebtedness. The only chance he had to do this was to borrow from the appellees the money necessary to pay his part of the indebtedness with which they were all being pressed in the court. The appellees loaned him the necessary money upon his agreement to give them a note, upon which his mother-in-law was surety, for the amount advanced.

It seems to us on the statement of the answer and on the facts as proved, giving section 14 of the law the construction contended for by appellant, that the note was filled out and used for the very purpose for which Magdalena Hermann had signed it as surety, and that there was no diversion whatever from that purpose. It is true, Peter Bitzer, in his testimony, changes the verbiage of what took place between him and his mother-in-law at the time she signed the note from that set up by her in her answer. He states that he told her he wanted her to sign the note in order that he could raise some money at the First National Bank for his business; but we apprehend, if there be a substantial difference between the statement in his testimoney and that of her pleadings, that the pleadings will prevail.

For these reasons, we are of opinion that the judgment of the trial court should be affirmed, and it is so ordered.

Digitized by Google

Decision No. 1170.

FIRST NATIONAL BANK OF HAZARD v. BARGER et al

(Court of Appeals of Kentucky. January 22, 1909.)

115 S. W. 726.

BANKS AND BANKING — SPECIAL DEPOSIT — NOTICE — TRIAL — INSTRUCTIONS — REPETITION — APPLICATION.

1. Evidence in an action against a bank by the payees of a check, protested by defendant, to recover the amount thereof, held sufficient to show notice to defendant, through its president, that another check deposited with defendant by the drawer of plaintiff's check was a special deposit for the payment of plaintiff's check.

2. Refusal of a requested instruction in substance covered by one given is not error.

3. A bank receiving a deposit with notice that it is made to meet outstanding checks drawn by the depositor may not charge the depositor's account with a debt due it from him, and thus defeat collection of the outstanding checks.

Appeal from Circuit Court, Perry County.

"Not to be officially reported."

Action by A. J. Barger and another against the First National Bank of Hazard, Ky. Judgment for plaintiffs. Defendant appeals. Affirmed.

B. P. Wootton, Jesse Morgan, and Greene & Van Winkle, for appellant. E. E. Hogg, for appellees.

NUNN, J. Prior to the year 1906 there was a bank in Hazard, Ky., known as "The Hazard Bank," which was incorporated under the laws of this State. S. C. Colwell had business transactions with this bank by which he became its debtor in a sum exceeding $1,500, for which he executed his note. The bank obtained a judgment upon the note, and an execution was issued thereon, and Colwell replevied it. When the replevin bond became due he failed to pay it, and an execution was issued upon it and placed in the hands of the coroner of that county. All the claim was paid, except about $535, for which Colwell gave a check to the coroner, on some bank in Winchester, Ky. This check was given February, 1907, and was sent to Winchester for collection, but payment was refused. Some time before this check was given, the bank referred to ceased to do business as a State bank, and organzed as a national bank, and was thereafter known as "The First National Bank of Hazard."

It appears from the record that Colwell had no dealings and no account with either of the banks, after the judgment was rendered against him in favor of the Hazard Bank, until the transactions occurred which are the subject of this litigation. About the 1st day of March, 1907, Colwell purchased a raft of logs from appellees, agreeing to pay them therefor $1,064.30, and at about the same time employed three persons to aid him with the raft; and on the 2d day of March he gave to appellees a check on appellant bank for the purchase price of the logs, and to Dorch & Co. a check for $20, one to

Digitized by Google

J. H. Hammons for $39.85, and to R. C. Hill for $20, making the total sum of the checks $1,144.15. Colwell had no money in appellant bank to meet these checks, but on the next day he went to Irvine, Ky., and there obtained a check from John Morgan, drawn on a bank in Richmond, Ky., payable to himself, for the sum of $1,144.15, the exact amount of the total of the checks he had issued on appellant bank. At the time he was in Irvine he saw C. G. Bowman, president of appellant bank, and gave the check to him to carry to Hazard, with directions to place it to his credit in the bank. He told Bowman at the time that he had drawn some checks on this bank, and that, if they reached there before the one he handed him, the cashier would protest them. Bowman did not return to Hazard as soon as he thought he would at the time Colwell gave him the check, so he mailed it to appellant without any statement of the purpose of the deposit. As soon as the check arrived at the bank the cashier sent it to Richmond for collection, but did not learn that it would be paid until the 12th of March. In the meantime the four checks drawn by Colwell had arrived at appellant bank, but were not paid. Bowman, the president of the bank, returned to Hazard and was in the bank when the information was received from Richmond that the check drawn by Morgan payable to Colwell, for $1,144.15, had been honored. Then it was that the cashier of the bank, in accordance with the order of Bowman, its president, gave Colwell credit for the $1,144.15, and charged him with the balance due on the judgment referred to, to wit, $535. After deducting this sum from the amount of the check, there was not enough left to pay appellees' check, and it was protested. Afterwards, the bank paid the other three checks above mentioned, and paid out the remainder on checks drawn thereafter by Colwell.

Appellees instituted this action to recover $1,064.30, the amount of their protested check with its interest, and alleged that the deposit of Colwell was a special deposit for the payment of the four first described checks; that that fact was known to its president at the time their check was protested; that appellant and Colwell acted in collusion to defraud them out of their money; that Colwell was insolvent at the time, which was known by appellant's officials; that it had no right or authority to charge the $535, which was secured to it by the replevin bond referred to, against this deposit which was placed there to meet their check and the three other small ones. The answer of appellant controverted the allegations of the petition. The case was tried by a jury, which returned a verdict in behalf of appellees.

Appellant contends that it is entitled to a reversal for the reason that there was no evidence sustaining appellees' cause of action; that it was entitled to a peremptory instruction to the jury to find for it; because the court gave improper instructions, and refused to give proper instructions offered by it. We are of the opinion that there was testimony tending to show that Bowman, the president of the bank, knew, or had reasons to know, that when appellees' check was protested the deposit made by Colwell was a special deposit to meet the check of appellees and the other three small ones. Colwell and Bowman both swore that at the time of the delivery of the check to Bowman, on the Richmond bank, Colwell told him that he had drawn some checks on appellant, and wanted to get the check then delivered

Digitized by Google

to Bowman to appellant before the others reached there, so that they would not be protested. In our opinion this was notice to Bowman that the deposit about to be made by Colwell was made for the special purpose of meeting these outstanding checks issued by Colwell. Bowman was asked the following questions, to which he answered as follows: "Q. Did you get home before the protest of the Barger check? A. I think I did. Q. You were at home when it came in? A. No, sir. Q. Did you know the cashier had protested it? A. I knew he would. Q. Did you come home the day it was protested? A. Yes, sir, the day it was protested. Q. Did you come in before it was protested? A. Yes, sir. Q. Why didn't you tell him not to do it? A. There were not sums sufficient to pay it." Further along in his deposition, he stated that the reason that there was not enough to pay appellees' check was because the bank had charged Colwell's account with the balance of the judgment debt. The evidence conduces to show that Bowman had been informed by Colwell that he had drawn checks on his bank, and wanted this deposit made before they reached the bank, for fear his checks payable to appellees and the other persons named would be protested. When Bowman returned from Irvine to Hazard he found the four checks drawn by Colwell in his bank, which amounted to exactly the same amount as the deposit. This fact was some evidence to a reasonable mind that these checks were the ones referred to by Colwell when he delivered the check to Bowman in Irvine, Ky. With these facts in his possession, Bowman directed the cashier of the bank to charge Colwell's account with the old judgment debt and protest the check of appellees. There was other evidence introduced, some of which tended to support appellees' claim and some conducing to show that appellees had no cause of action. But we have referred, especially, to the above facts to show that the court committed no error in refusing the peremptory instruction on behalf of appellant.

The court gave to the jury three instructions. The first is as follows: "If you shall believe from the evidence that S. C. Colwell, on or about March 1, 1907, drew a check on the First National Bank of Hazard, Ky., directing said bank to pay to the plaintiffs herein $1,064.30, and that thereafter, and on about March 3, 1907, the said Colwell delivered to C. G. Bowman, at Irvine, Ky., a check for an amount sufficient to pay checks drawn to plaintiffs to be deposited in defendant bank to his credit for the purpose of paying the check drawn to plaintiffs, and that said check was delivered to said Bowman with instructions to be deposited in defendant bank for the purpose of paying outstanding checks delivered to the plaintiffs, and that said check delivered to said Bowman was collected by said bank before the protest of plaintiffs' check, and that said bank had notice through C. G. Bowman, or otherwise, that said deposit was made for the purpose of paying the plaintiffs' outstanding check, then they will find for the plaintiffs the sum of $1,064.30." The second instruction authorized the jury to find for appellees if they believed from the evidence that appellant bank fraudulently appropriated any part of the money deposited to the payment of its old judgment, and by reason of such appropriation it did not have sufficient money in its bank, due Colwell, for the payment of appellees' check. The third was to the effect that, if the jury did not believe from the evidence as stated in instruction Nos. 1, or 2, then they would find for appellant. The

Digitized by Google

instructions offered by appellant, which the court refused to give, in substance included the same ideas expressed in the instructions given by the court. About the only difference is, the instruction offered by appellant used the words, "a special deposit to the credit of Colwell for the special purpose of meeting the check of appellees;" and the instruction given by the court used the words, "to be deposited in defendant bank for the purpose of paying outstanding checks delivered to the plaintiffs, and that said check delivered to said Bowman was collected by said bank before the protest of plaintiffs' check, and that said bank had notice through C. G. Bowman, or otherwise, that said deposit was made for the purpose of paying the plaintiffs' outstanding check." We are of the opinion that the court committed no error prejudicial to the substantial rights of appellant in the giving of the instructions.

The law is that, if a bank receives a general deposit from one who is indebted to it, the bank has the right to charge the depositor's account with such indebtedness; but if the bank receives a deposit with notice that it is made for the purpose of meeting outstanding checks drawn by the depositor, it has no right to charge the depositor's account with sums due it by the depositor, and thus defeat the person holding the outstanding claims from collecting their checks. This rule applies only when the bank has notice of the previous appropriation of the sum deposited, or, in other words, that it is a special deposit to meet outstanding checks issued by the depositor.

In our opinion, there was testimony introduced which supported the verdict of the jury.

For these reasons, the judgment of the lower court is affirmed.

Decision No. 1171.

MARLING v. FITZGERALD et al.

(Supreme Court of Wisconsin. February 16, 1909.)

120 N. W. 388.

BILLS AND NOTES — CONSIDERATION — SUFFICIENCY — ASSIGNMENT WITHOUT INDORSEMENT — ESTOPPEL TO ASSERT DEFENSE — ASSIGNMENT — DEFENSES.

1. There is a consideration for a note, though the money called therefor is not advanced at the time the note is given or at all; it, with a mortgage securing it, being delivered for money to be advanced subsequently, and the security, however, to take effect presently.

2. Where a note, secured by mortgage, to take effect immediately, is given to a dealer therein for money to be advanced subsequently, the maker is estopped to assert failure to advance the money, as against one who took the same from the payee for value and in good faith, without negligence, though the taking was without an indorsement, essential to due course; the rules of the law merchant (Negotiable Instruments Act (Laws 1899, pp. 703, 709, c. 356), §§ 1676–19, 1676–28), giving way to the supreme rule of estoppel in pais.

3. Though the assignment of a note for value and without notice is without due course, the defenses to which it is subject are only those existing at the time of

Digitized by Google

the transfer, and not those which possibly may at some future time exist; so that the note having been given for advances to be made subsequently, failure of the payee to make them will not prevent recovery by the assignee.

Appeal from Circuit Court, Milwaukee County; Warren D. Tarrant, Judge.

Action by Celia Ellis Marling against Charles Fitzgerald and others. From an adverse judgment, plaintiff appeals. Reversed and remanded, with directions.

Action to foreclose a mortgage.

The issues raised by the pleadings were closed by findings of fact, which may be presented as follows: March 19, 1903, defendant Charles Fitzgerald, the then owner of the premises described in the complaint, duly mortgaged the same to defendant Herman to secure payment of said defendant's note of like date, for $3,000, payable to the order of said Herman, three years after date, with interest at the rate of 5 per cent. per annum, and said mortgage was duly recorded. The transaction occurred pursuant to an application by said defendant to said Herman for a loan of $3,000, to be used in the erection of a building on the mortgaged premises, the money to be advanced as fast as the improvement progressed. Upon the delivery of the note and mortgage to Herman, he delivered to said defendant an acknowledgment of the purpose thereof and, in effect, that he was indebted to said defendant to the amount of the loan, payable as before indicated. March 20, 1903, said Herman borrowed of George Ellis $1,900, giving his promissory note therefor, payable three months after date, and for collateral security for the payment of the debt, delivered to said Ellis said first mentioned note and the mortgage, duly assigning the same in writing, but not so as to enable the said Ellis to record the assignment and it never was recorded. Before the commencement of the action plaintiff became the owner of said $1,900 note and succeeded to all rights of said George Ellis to said collateral security. The said $1,900 note is wholly unpaid as well as the interest thereon from its date. No part of said $3,000 loan was ever paid to said Fitzgerald, nor could he ever collect any part thereof. Herman was known to Fitzgerald, at the time the mortgage was given, to be engaged in dealing in notes and mortgages and in loaning money for himself and others on real estate security.

On such facts the court concluded: First, the note and mortgage were given without consideration; second, neither said Ellis nor plaintiff took said note in due course so as to be entitled to the protection of the law merchant; third, the latter holds he same subject to equities and defenses, including the defense of failure of consideration, which said Fitzgerald would have, had the security remained in the hands of said Herman, and is, therefore, not entitled to enforce the same at all, and is liable to Fitzgerald for his costs and disbursements in the action.

Judgment against plaintiff was rendered accordingly and was so rendered.

Goff, Hayes & Hannan, for appellant. Dorr & Gregory for respondents.

Digitized by Google

MARSHALL, J. (after stating the facts as above). The foregoing statement presents this proposition: If A mortgages his property to B to secure a loan of money, to be advanced from time to time, knowing that he is a dealer in such securities, B agreeing to make the advancements at times and in a manner specified, and in harmony with the understanding between the parties placing the mortgage upon record, acquiring the status as to all the world of being the owner of the securities and a debtor to A for the money agreed to be advanced, and thereafter B, for value, sells and duly assigns such securities to C, who takes the same without knowing of the relation of debtor and creditor between A and B under the agreement as to the advancement of money, the transaction between B and C not being such as to give the latter the protection of the law merchant, and B, neither before the assignment nor thereafter, advances the money or any part thereof to A and wholly breaches his agreement in that regard, can C, nevertheless, enforce the note and mortgage against A?

If the proposition as stated be answered in the negative, as counsel for respondents contend it should be, and the learned Circuit Court decided, the judgment must be affirmed. If, on the contrary, it be answered in the affirmative, as counsel for appellant contend it should be, the judgment must be reversed and the cause be remanded for judgment according to the prayer of the complaint.

The situation is governed by a few plain legal principles in respect to which the learned Circuit Court went astray.

Manifestly, the note was not without consideration to support it, merely because the money called for thereby was not advanced at the time it was given, nor at all. The agreement to advance the money, and the creation of the relations of debtor and creditor between Herman and Fitzgerald, were amply sufficient to support the note, respecting the consideration feature, as the actual transition of the money from the former to the latter at the time the securities were delivered by the one to the other, would have been. That is too manifest to require discussion. The learned trial court, it seems, failed to distinguish between delivery of a note and mortgage by the payor to the payee for money to be advanced subsequently, the security to take effect presently, and delivery thereof, but not to take effect till performance of a specified condition, as to making the advancement. In the former circumstances, the security would be a valid obligation from the start, but in the latter, performance of the condition would be essential to such validity. Nutting v. Minn. Fire Ins. Co., 98 Wis. 26, 73 N. W. 432; Thorne v. Ætna Ins. Co., 102 Wis. 593, 78 N. W. 920; State ex rel Jones v. Chamber of Commerce, 121 Wis. 110, 98 N. W. 930; Golden v. Meier, 129 Wis. 14, 107 N. W. 27, 116 Am. St. Rep. 935; Hodge v. Smith, 130 Wis. 326–333, 110 N. W. 192; Ware v. Smith, 62 Iowa 159, 17 N. W. 549; Belleville Savings Bank v. Bornman, 124 Ill. 200, 16 N. E. 210; Merchants' Exch. Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698.

Again the learned Circuit Court misapprehended the law in assuming, if the note would be subject to defenses as between Fitzgerald and Herman, because of the latter not having keep his agreement with the former by advancing the money, the former could, under all circumstances, including the taking of the securities for value and in good faith without negligence, from Herman, by a third person,

Digitized by Google

George Ellis, and without such taking have the essential of due course, of an endorsement of the note by Herman before maturity, make such defenses as against the third person. Such a situation is not governed absolutely by the law merchant. Before it can be solved in favor of the payor of the note, the familiar principle of equity, essential to the promotion of justice, must be dealt with, that if a person, by conduct, reasonably calculated to lead another to act upon the faith thereof, and he does so act, without negligence and in such manner that he would suffer damage if the appearances created by such conduct were not warranted by the true situation, such person is precluded from taking advantage thereof to such other's injury. Whether that would apply in a case of this sort; in case of a want of consideration to support the note, or in case of its not having validity as between the original parties except upon performance of a condition precedent which is not performed, or even in case of the maker not having any reasonable ground to apprehend a probability of the note being taken by a third person, for value, without apprehending the existence of any equities in regard thereto or being negligent in respect to the matter, need not be considered, because no such situation characterizes this case, as we have seen.

It would seem, upon principle, that the law of estoppel ought to govern this case in favor of appellant, especially since Fitzgerald knew, or ought to have known, when he gave Herman the securities, that the latter was liable to transfer the same to another who would take the same as George Ellis did, and in the exercise of due care, having a right to believe that they were just what they appeared to be. He put Herman in a position to easily delude another in that regard, even making no restriction as to a transfer of the paper or recording of the mortgage, notwithstanding knowledge of his business. Can one do that, and then take advantage of circumstances which such other had no knowledge of, nor any reasonable ground to suspect, to such other's injury? Can one put up the bar of his own negligence and thereby save himself from loss by failure of another to perform an agreement with him, forming a full consideration for his note, and thereby effect, as to an innocent third person, a fraud to such third person's injury? It would seem that the principle of estoppel plainly arises to the contrary, so plain that illustration by reference to precedents to support such conclusion is not necessary.

Passing to the field of precedents we find, as would be expected, that the principle suggested has been often applied to situations the same or similar to the one before us, for the protection of the innocent third person, and search fails to enable one to discover where it has been invoked in vain. On this, many cases cited by the learned counsel for appellant show so clearly the trend of authority that we will refer thereto with others: Two Rivers Mfg. Co. v. Day, 102 Wis. 328, 78 N. W. 440; Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423; Marling v. Nommensen, 127 Wis. 363, 106 N. W. 844, 5 L. R. A. (N. S.) 412, 115 Am. St. Rep. 1017; Bogart v. Stevens, 69 N. J. Eq. 800, 63 Atl. 246, 115 Am. St. Rep. 627; Bush & Howard v. Cushman, 27 N J. Eq. 131; Combes v. Chandler, 33 Ohio St. 178; Wilson v. Hicks, 40 Ohio St. 418; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Moore v. Metropolitan Bank, 55 N. Y. 41, 14 Am. Rep. 173; Davis v. Beckstein, 69 N. Y. 442, 25 Am. Rep. 218; Boardman v. Lake S. & M. S. Ry. Co., 84 N. Y. 182; Parker v. Connor, 93 N. Y.

Digitized by Google

118, 45 Am. Rep. 178; Simpson v. Del Hoyo, 94 N. Y. 189; Cable v. Ellis, 86 Ill. 525; Marshall v. Enders, 20 Ill. App. 312; Atlanta Guano Co. v. Hunt, 100 Tenn. 89, 42 S. W. 482; Kempner v. Huddleston, 90 Tex. 182, 37 S. W. 1066; Norfolk & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755; Jones on Mortgages, § 683.

In the text-books referred to the rule is laid down thus:

If a person induces another to take an assignment of the mortgage from the holder of it "upon the representation that it is a good and valid security" he cannot subsequently impeach the validity of the mortgage "in the hands of such assignee." Having by word or deed induced another to part with his money for the security he is not allowed to repudiate the truth of his representation, and escape the payment of the obligation by showing that, as between himself and the former holder, it was invalid.

Whether that applies generally we need not now decide or go further than the facts of this case.

The principle stated is not restricted to acts or representations directly between the maker of the securities and the assignee. Constructive representations, conduct equivalent to actual representations, as by giving to the holder of securities all of the characteristics of ownership, so that he may hold and transfer the same with all the usual appearances of absolute right to do so and with reasonable knowledge that they will, or may do so, is certainly sufficient. That runs through all the cases cited and many more that might be referred to. True, such cases do not all exactly fit the facts of this case, but they do so in principle. Bush & Howard v. Cushman, supra, is exactly in point, when we consider that conduct equivalent to actual representation, inter partes, is likewise equivalent thereto in effect, as to estoppel in pais. It is particularly applicable here, since Fitzgerald, as we have seen, must have known from the nature of Herman's business that he was liable to and probably would sell the securities to some person without disclosing the nature of his business relations with the payor,

Bogart v. Stevens, supra, is quite like this case. We are unable to see any material distinction between clothing an agent with the semblance of being the owner of securities accompanied by actual authority to transfer the same for value, and vesting the actual title to such securities in a person with all the semblance of absolute ownership, knowing that he is liable to, and probably will, transfer them to another, for value, having no knowledge, or reasonable means of knowledge, of any present or future defense thereto.

In McNeil v. Tenth National Bank, supra, it is said, in effect, that, except as regards the effect of the law merchant an assignee of assignable papers obtains no greater right than his assignor possesses, but said the court:

"It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confi-

Digitized by Google

dence he caused or allowed to appear to be vested in the party making the conveyance."

Counsel for respondents place their sole reliance on the idea that the note was without consideration at the start, hence without validity, which is wrong, as we have seen, and on the law merchant as incorporated into section 1676–19 of the negotiable instrument statute (chapter 356, p. 703, Laws 1899), to the effect that the taker for value of a negotiable instrument without indorsement takes no better title than his assignee had thereunder, and section 1676–28, to the effect that a holder of negotiable paper, who does not acquire it in due course, is subject to the same perils as regards defenses by the payor as the payee was. Those rules as we have seen, give way to the supreme rule of estoppel in pais. We are referred with confidence to Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904. Suffice it to say that we are unable to see that it touches the question in hand.

We are further referred to Rapps v. Gottlieb et al., 142 N. Y. 164, 36 N. E. 1052, where the court grounded its decision on the doctrine that an assigneee without indorsement, of negotiable paper, takes it subject to all the defenses available as to the original parties, holding it to be applicable because the note and mortgage in question never had validity as obligations, since they were delivered to the named payee to take effect according to their tenor and not otherwise at all, only upon the happening of a condition precedent. Under those circumstances, negligence or inexcusable holding out on the part of the payor essential to efficient application of the doctrine of estoppel in pais was not found to exist. Without appreciation of the precise grounds for the decision one would be quite liable to be led astray, especially in view of a brief discussion at the closing of the opinion of the invocability of the doctrine of estoppel in pais. The court reasoned thus:

"It is a rule of last resort, applicable only where all others fail; it is a doctrine subordinate and not dominant, which reverses no other, but submits to the authority of all, and is adequate to an ultimate decision only when it has the field to itself."

As those expressions are liable to be understood they hardly give proper dignity to the doctrine of estoppel in pais. True it is a rule of last resort, but where it is applicable it is not subordinate. It stays the operation of other rules which have not run their course, when to allow them to proceed further would be a greater wrong than to permanently enjoin them. It is a rule of justice which, in its proper field, has a power of mastery over all other rules. It is a rule, by no means to be discredited, but rather one entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords.

There is this further insurmountable difficulty in sustaining the judgment. The rule that a negotiable instrument in the hands of an assignee for value and without notice of defenses as between the original parties is subject, nevertheless, to such defenses, has relation to such equities or defenses as existed at the time of the transfer, not to latent defenses or equities which possibly may at some future time exist. As said in Bush & Howard v. Cushman, supra: It does not embrace "equities or defenses springing from defaults, or even fraud of the assignor, committed subsequent to the assignment, and which had no existence, and were simply possibilities, at the time of the assignment."

Digitized by Google

The same doctrine was applied in Coster v. Griswold, 4 Edw. Ch. (N. Y.) 364–374. The views of the court are thus expressed:

"All that the court of law or equity can do in such cases, since they recognize and protect the rights of assignees of choses in action, is, to allow them to take, subject always to any defense, legal or equitable, which existed in favor of the debtor against the original holder or creditor at the time of the transfer or assignment. Now, the question arises: What existing equity or defense was there against these bonds . . . ." when they were pledged to the "United States Bank as collateral security . . . ?" And, again, "Where an assignee takes in good faith, his right to hold will not be disturbed or divested by any subsequent event or after-accruing right or equity of the debtor."

To the same effect are Chance v. Isaacs, 5 Paige Ch. (N. Y.) 592; Cornish v. Bryan, 10 N. J. Eq. 146; Losey v. Simpson, 11 N. J. Eq. 253; Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 442; Flemming v. Hoboken, 40 N. J. Law 270; North Bergen v. Eager, 41 N. J. Law 184–189; Ex parte Hale, 3 Ves. Jun. 304; Terney v. Wilson, 45 N. J. Law 282.

Here, as we have seen, at the time of the assignment to George Ellis, Herman was the absolute owner of the note and mortgage. They were not waiting upon the happening of any event to give them validity. Herman owed Ellis $3,000, but was not in default. He had, at best, a possible contingent defense or equity. Under those circumstances, within the authorities cited, Ellis could safely take, in good faith, for value, the note from Herman. The latter's subsequent mere default could not operate to his prejudice.

The judgment is reversed, and the cause remanded for judgment according to the prayer of the complaint.

WINSLOW, C. J., took no part.

Decision No. 1172.

PACKARD et al. v. FIGLIUOLO.

(Supreme Court, Appellate Term. February 5, 1909.)

114 N. Y. Supp. 753.

BILLS AND NOTES — ACTION ON CHECK — BURDEN OF PROOF.

In an action on a check drawn by defendant and indorsed by a third person, where the uncontradicted evidence showed that the indorser obtained title to the check by fraud, his title was defective under the express provisions of Negotiable Instruments Law (Laws 1897, p. 732, c. 612), § 94, and the burden was upon plaintiffs to prove that they or some person under whom they claimed had acquired the title as a holder in due course, under the express provisions of section 98.

Appeal from Municipal Court, Borough of the Bronx, Second District.

Action by Nathan J. Packard and another against Julius Figliuolo. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Digitized by Google

Argued before GILDERSLEEVE, P. J., and GIEGERICH and SEABURY, JJ.

Wayer & Acker, for appellant. Julius D. Tobias, for respondents.

SEABURY, J. The plaintiffs sue upon a check drawn by the defendant and indorsed by one Daddio. The only evidence offered in behalf of the plaintiffs was the check, upon which payment had been stopped. The uncontradicted evidence shows that Daddio obtained title to the check by fraud. Daddio's title to the check having been shown to be defective, the burden was upon the plaintiffs to prove that they, or some person under whom they claimed, acquired the title as a holder in due course. Negotiable Instruments Law (Laws 1897, pp. 732, 733, c. 612), §§ 94, 98.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

Decision No. 1173.

In re ELLARD et al.

(Supreme Court, Special Term, New York County. January 21, 1909.)

114 N. Y. Supp. 827.

LOST INSTRUMENTS — NEGOTIABLE INSTRUMENTS — ESTABLISHMENT — JURISDICTION — INDEMNITY — CONSTITUTIONAL LAW — DETERMINATION OF CONSTITUTIONAL QUESTIONS — HOW TESTED — BILLS AND NOTES — CERTIFICATES OF DEPOSIT — NEGOTIABILITY — LOST CERTIFICATES OF DEPOSIT — OBLIGATION OF CONTRACTS.

1. Equitable jurisdiction to establish lost instruments may be invoked respecting negotiable instruments.

2. Generally equity requires the giving of an indemnity before establishing a lost negotiable instrument, unless it appears with certainty that no loss can result.

3. The constitutionality of a statute is to be tested, not by what has been done under it, but by what may by its authority be done.

4. Certificates of deposit may by their terms be negotiable.

5. Banking Law (1 Birdseye Rev. St. [3d Ed.], p. 275] §§ 227–238 (Laws 1899, p. 923, c. 451, as amended by Laws 1901, pp. 375, 1243, cc. 171, 503), authorizes one claiming to own a certificate of deposit which is alleged to have been lost to maintain a proceeding to enforce payment of such certificate, or, in the event of the petitioner's having given a bond of indemnity to the bank, to procure an adjudication that the certificate is void and that the bond be discharged. It also provides that, after the amount is paid as directed by the order of the court, no claim thereafter made by any person having the certificate in his possession shall be available against the bank, which shall thereupon be released from further liability. The statute makes no provision for the protection of the rights of third parties in the certificate, except to require notice of the application to be published in two newspapers. Held, that as to bona fide holders of certificates the statute is unconstitutional, as impairing the obligation of contracts.

Application by John Ellard and another to require the Mt. Morris Bank of New York to pay over money deposited in said bank by petitioners. Application denied.

Digitized by Google

Daniel F. Cohalan, for petitioners. Alexander & Greene, for respondent.

SEABURY, J. The petitioners move for an order requiring the Mt. Morris Bank of New York to pay them the amount, with interest, named in a certificate of deposit issued and delivered by the bank to them. The certificate provides as follows:

"No. 12,730. Mt. Morris Bank of the City of New York. New York, January 10th, 1908. $26,438.03. John Ellard has deposited in this bank twenty-six thousand four hundred and thirty-eight 03/100 dollars, payable to the order of John or Margaret Ellard on the return of this certificate properly indorsed, with 3½ per cent. interest, if held until April 1st, 1908. Lindley H. Hill, Cashier. William Alexander, Teller."

Upon the back of this certificate was subsequently indorsed the following statement: "Interest paid to April 2, 1908." The petitioners allege that the certificate has never been indorsed, assigned, or sold, and that it was lost on or about October 6, 1908, notice of which loss was given by the petitioners to the bank on November 10, 1908. The present application for an order requiring the bank to pay to the petitioners the amount named in the certificate of deposit is made under sections 227 to 238 of the Banking Law (1 Birdseye Rev. St. (3d ed.) p. 275), being chapter 451, p. 923, of the Laws of 1899, as amended by chapters 171 and 503, pp. 375, 1243, of the Laws of 1901. The bank, in answer to the petition, attacks the constitutionality of the statute under which the application is made. The statute referred to authorizes a person claiming to be the owner of a certificate of deposit which is alleged to have been lost or destroyed to maintain a proceeding to enforcement payment of such certificate, or in the event of the petitioners having given a bond of indemnity to the bank, and having thus secured payment of the certificate of deposit, to procure an adjudication that the certificate is null and void and that the bond be discharged. This statute makes no provision for the protection of the rights of third parties in the certificate, except to require notice of the application to be published in two newspapers. This statute also provides (section 11, c. 451, p. 925, of the Laws of 1899, as amended by section 9, c. 171, p. 379, of the Laws of 1901) that after the amount shall have been paid as directed by the order of the court "no claim thereafter made by any person having such certificate in his or her possession shall be available against such bank, and the bank shall forever hereafter be fully and entirely relieved of any liability by reason of its having issued such certificate or for the money due thereon."

The establishment of lost instruments has long been a well-defined ground of equitable jurisdiction (Reeves v. Morgan, 48 N. J. Eq. 415, 21 Atl. 1040), and such jurisdiction can be invoked in reference to instruments which are negotiable. The general rule is that, unless it appears with certainty that no loss could result, equity requires the giving of an indemnity before granting this relief. Equitable jurisdiction arose from the fact that the remedy at law was inadequate. At common law a recovery upon an instrument was allowed only when profert was made. When the instrument was lost this remedy was necessarily unavailable. Statutory enactments have clothed courts of law with more ample authority in these cases, but such statutes generally require that indemnity shall be given. Such is the rule prevailing in an action at law in this State. Code Civ. Proc.,

Digitized by Google

§ 1917. These rules have their origin in justice and reason, and a statutory substitute for them which will not impair private rights is not easy of creation. The crude attempt to supply a substitute revealed in the statute now before the court is open to grave objections. So far as this statute attempts to affect rights under certificates of deposit given before its enactment, it has already been declared unconstitutional. Matter of Cook, 86 App. Div. 586, 83 N. Y. Supp. 1009. In that case the court decided only the question before it, and intimated no opinion as to the constitutionality of the statute as affecting certificates of deposit issued subsequent to its enactment.

The question which was left undecided in that case is the precise question presented for decision in the application now made. The constitutionality of a statute is to be tested, "not by what has been done under it, but by what may by its authority be done." Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289. While the courts have experienced considerable difficulty in determining as to the exact legal character of certificates of deposit, yet it is now settled that such certificates may by their terms be negotiable. The certificate which was issued to the petitioners by the Mt. Morris Bank is negotiable. Being negotiable, one who has possession of it as a bona fide holder is entitled to payment. If the certificate of deposit has become the property of a bona fide holder, such a holder is absolutely entitled to receive payment of the amount named in the certificate. The fact that the bank had paid the amount of the certificate to the petitioners, to whom it was originally issued, would not be a defense to an action upon it by a bona fide holder. The right of a bona fide holder of a negotiable instrument to recover upon it against the maker cannot be affected by the fact that the person to whom the certificate was delivered in the first instance has recovered the amount therefor from the bank and that the bank paid such sum in the belief that the certificate was lost. Farmers' Bank v. Maxwell, 32 N. Y. 579. Nor can the statutory provisions that the bank shall under these circumstances be relieved of further liability cancel the contract upon which a bona fide holder on the production of the original certificate is absolutely entitled to recover. It is not possible to sustain the constitutionality of this statute upon the theory that the bank having contracted with knowledge of its provisions assumed on that account the risk of being compelled to pay twice the amount of its original obligation. In issuing the certificate of deposit in question the bank bound itself by its contract to pay the sum therein named to the bona fide holder of the certificate, and neither the act of the bank nor the legislature can cancel the rights of a bona fide holder of the certificate. So far as this act assumes to defeat the right of a bona fide holder, the counsel for the petitioners seems to recognize that it is invalid. He is, therefore, obliged to assume the position that the bank may be forced to pay twice the amount of its obligation, and argues that this is just and constitutional, because the bank, knowing the provisions of the statute when it issued the certificate, should have limited its liability. If we assume for a moment that this is in fact the attitude in which the bank is placed, let us consider what the effect of its position would be. If this is its position, it is forbidden to issue a negotiable certificate of deposit unless it is willing to assume the hazard of being compelled to pay it twice and thus assume a double liability. If it attempts to limit its liability, the instrument ceases to be negotiable.

Digitized by Google

It is argued that the bank should limit its liability by providing that the certificate should be assignable only on the books of the bank. The difficulty with this suggestion is that if it was followed the certificate would be no longer negotiable. Zander v. N. Y. Security & Trust Co., 178 N. Y. 208, 70 N. E. 449, 102 Am. St. Rep. 492. The bank cannot annex any provision to the certificate which would limit its liability or protect itself against the reappearance of the certificate in the hands of a bona fide holder without destroying the negotiability of the instrument. That the instrument shall by its terms be payable absolutely and at all events is an essential requisite to its possessing the quality of negotiability. The argument of the counsel for the petitioners leads, therefore, to this result: That to avoid the position involved in asserting that the rights of a bona fide holder would be canceled under the statute he is forced to the position that the bank, under the statute, cannot issue a negotiable certificate unless it assumes the hazard of being compelled to pay it twice. A statute which imposes upon the maker of a certificate of deposit a liability equal to twice the amount of its contract provided that it issues a negotiable certificate of deposit impairs its freedom of contract. If, therefore, we view this statute either from the standpoint of the bank or of a bona fide holder other than the person to whom it was issued, we find it equally repugnant to constitutional provisions. If the attempt be made to sustain the statute upon the ground that the bank can be called upon to pay but once, as the statute itself in terms provides, then, if the instrument is in fact produced by a bona fide holder, his right to recover upon his contract is canceled, and the statute impairs the obligation of his contract. If the attempt is made to sustain the statute upon the ground that the bank can only be held liable for the amount of its contract upon condition that it limit its liability, the condition annexed is equivalent to a prohibition against issuing a negotiable certificate and thus destroy the bank's freedom to contract.

An effort is made to sustain the constitutionality of the statute upon the ground that it affects the remedy merely. The statute under consideration cannot be sustained upon this ground. It provides that when the bank shall have paid the amount of the certificate, pursuant to the order of the court, it shall be relieved of further liability. This statute does not, therefore, provide a change of remedy by which either the bank or a bona fide holder may enforce their contract, but attempts to extinguish the contract altogether. As was said in the Matter of Cook, supra:

"The statute in question offers no indemnity to the party whose rights are abrogated. It attempts to divest the owner of such a certificate of his property upon a condition not named in the contract, in clear contravention, as I think, of the rights guaranteed to him by the State and Federal Constitutions."

While this criticism of the statute was directed to its being applied when the certificate was issued prior to its enactment, I cannot see that it loses any of its cogency when applied to the facts now before the court. Having been reluctantly forced to the conclusion that the statute is clearing in contravention of the Constituion, no other alternative is possible than to so declare it and to deny the application of the petitioners.

The application is denied. Settle order on notice.

Digitized by Google

DOMESTIC POSTAGE.

FIRST-CLASS MATTER (Letters, etc.)	2c. an oz.
SECOND-CLASS (Newspapers and Periodicals)	1c. for 4 oz.
THIRD-CLASS (Books, Circulars)	1c. for 2 oz.
FOURTH-CLASS (Merchandise)	1c. an oz.
REGISTRATION FEE (additional postage)	8c.
IMMEDIATE DELIVERY STAMP (additional to regular postage)	10c
MONEY ORDER ($1 to $100)	3c. to 30c.

See below for Explanations and Exceptions.)

FIRST-CLASS MATTER. — Letters and all other written matter (whether sealed or not), excepting manuscript copy accompanying proof-sheets, also all matter sealed (see below), 2 cents an ounce, excepting drop letters at NON-CARRIER offices, 1 cent an ounce. (Postal cards 1 cent each.)

SECOND-CLASS. — Newspapers and periodicals published quarterly and oftener, and not for gratuitous distribution. The general public pay by affixing stamps at the rate of 1 cent for each 4 ounces or part thereof when not sealed.

THIRD-CLASS. — Books (printed, not blank), circulars, other printed matter proof-sheets and manuscript copy accompanying same, valentines, sheet music, heliotypes, chromos, posters, lithographs and printed advertising matter in general, all, when not sealed, 1 cent for two ounces or fraction.

FOURTH-CLASS. — Merchandise and samples, including printed matter in quantity, blank books and paper, ores, all matter not included in any of the other classes, and not in its nature perishable or liable to injure the contents of the mails, (By express ruling the postage on seeds, cuttings, roots, scions and plants is at the rate of 1 cent for each 2 ounces.) All, when not sealed, and not exceeding 4 pounds in weight, 1 cent an ounce or fraction.

SEALING. — Any matter is regarded as sealed when it is not so wrapped as to allow of a thorough examination without in any way injuring the wrapping.

REGISTRATION. — First, third and fourth-class matter may be registered at any post-office by affixing 8 cents in stamps in addition to the regular postage.

MONEY ORDER RATES. — Sums not exceeding $2.50	3c.
Over $ 2.50 and not exceeding $ 5.00	5c.
Over $ 5.00 and not exceeding $ 10.00	8c.
Over $10.00 and not exceeding $ 20.00	10c.
Over $20.00 and not exceeding $ 30.00	12c.
Over $30.00 and not exceeding $ 40.00	15c.
Over $40.00 and not exceeding $ 50.00	18c.
Over $50.00 and not exceeding $ 60.00	20c.
Over $60.00 and not exceeding $ 75.00	25c.
Over $75.00 and not exceeding $100.00	30c.

POSTAGE TO CANADA AND MEXICO. — Same as domestic rates, excepting fourth-class matter, to the amount of 4 pounds 6 ounces, with the exception of liquids, pastes, confections and fatty substances, and publications which violate the copyright law. To Canada and Mexico (except sealed packages and liquids), Com. papers to both countries at usual rates.

FOREIGN POSTAGE.

All countries are included in the POSTAL UNION, to which the rates are as follows: Letters, per half ounce, 5 cents; second and third-class matter, per 2 ounces, 1 cent; postal cards, 2 cents each.

PUERTO RICO, PHILIPPINE ISLANDS AND GUAM.

All matter for or from these islands is transmissible at domestic rates and conditions of postage.

CUBA AND THE HAWAIIAN ISLANDS.

All matter is transmissible at domestic rates.

Digitized by Google

INTEREST LAWS.

STATES AND TERRITORIES.	Legal Rate of Interest.	Rate by Contract.	Penalty for Usury
	Per cent.	Per cent.	
Alabama	8	8	All interest forfeited.
Alaska	8	8	All interest forfeited.
Arizona	6	Any rate.	None.
Arkansas	6	10	Principal and interest forfeited.
California	7	Any rate.	None.
Colorado	8	Any rate.	No forfeit except with pawnbrokers.
Connecticut	6	6	None.
Delaware	6	6	Forfeiture of double amount of loan
District of Columbia	6	10	Forfeiture of interest.
Florida	8	10	All interest forfeited.
Georgia	7	8	Excess of lawful rate forfeited.
Idaho	7	12	(a).
Illinois	5	7	Entire interest forfeited.
Indian Territory	6	8	Principal and interest forfeited.
Indiana	6	8	Excess of interest forfeited.
Iowa	6	8	Forfeiture of interest and costs with 10 per cent per year to School Fund.
Kansas	6	10	Excess of interest forfeited.
Kentucky	6	6	
Louisiana	5	8	Interest forfeited.
Maine	6	Any rate.	None.
Maryland	6	6	Excess of interest forfeited.
Massachusetts	6	Any rate.	None.
Michigan	5	7	Interest forfeited.
Minnesota	6	10	Principal and interest forfeited.
Mississippi	6	10	Interest forfeited.
Missouri	6	8	Interest forfeited.
Montana	8	Any rate.	None.
Nebraska	7	10	Interest and costs forfeited.
Nevada	7	Any rate.	None.
New Hampshire	6	6	Three times excess of interest forfeited
New Jersey	6	6	Entire interest and costs forfeited.
New Mexico	6	12	$100 fine and forfeiture of twice the amount.
New York	6	6	Principal and interest forfeited. Contract void.
North Carolina	6	6	Twice amount paid forfeited.
North Dakota	7	12	Entire interest forfeited.
Ohio	6	8	Excess forfeited.
Oklahoma	7	12	Interest forfeited.
Oregon	6	10	Principal and interest forfeited.
Pennsylvania	6	6	Excess of interest forfeited.
Rhode Island	6	Any rate.	None.
South Carolina	7	8	Double the excess forfeited.
South Dakota	7	12	All interest forfeited.
Tennessee	6	6	Excess of interest forfeited.
Texas	6	10	Entire interest forfeited.
Utah	8	Any rate.	None.
Vermont	6	6	Forfeiture of usury.
Virginia	6	6	Interest forfeited.
Washington	6	12	Double illegal interest forfeited.
West Virginia	6	6	Excess of interest forfeited.
Wisconsin	6	10	Entire interest forfeited and treble excess paid recoverable.
Wyoming	8	12	Forfeiture of interest and costs.

Digitized by Google

GRACE AND STATUTES OF LIMITATIONS.

STATES AND TERRITORIES.	Notes. Bills.	Sight Drafts.	Open Accounts.	Notes and Contracts.	Judgments
			Years.	Years.	Years.
Alabama	Grace	Grace	3	6	20
Alaska	Grace	No Grace	6	6	10
Arizona	No Grace	No Grace	3	4	5
Arkansas	Grace	Grace	3	5	10
California	No Grace	No Grace	2	2–4	5
Colorado	No Grace	No Grace	....	6	6
Connecticut	No Grace	No Grace	6	6	20
Delaware	No Grace	No Grace	3	6	10
District of Columbia	No Grace	No Grace	3	3	12
Florida	No Grace	No Grace	2	5	20
Georgia	No Grace	No Grace	4	6–20	7
Idaho	No Grace	No Grace	4	5	6
Illinois	No Grace	No Grace	5	10	20
Indian Territory	Grace	Grace	3	5	10
Indiana	No Grace	No Grace	6	10	20
Iowa	No Grace	No Grace	5	10	20
Kansas	No Grace	No Grace	3	5	5
Kentucky	No Grace	No Grace	2–5	15	15
Louisiana	No Grace	No Grace	3	5	10
Maine	No Grace	Grace	6	6–20	20
Maryland	No Grace	No Grace	3	3–12	12
Massachusetts	No Grace	Grace	6	6	20
Michigan	No Grace	No Grace	6	6	6–10
Minnesota	No Grace	No Grace	6	6	10
Mississippi	Grace	Grace	3	6	7
Missouri	No Grace	No Grace	5	10	10
Montana	No Grace	No Grace	3	8	10
Nebraska	No Grace	No Grace	4	5	5
Nevada	Grace	No Grace	4	6	6
New Hampshire	No Grace	Grace	6	6	20
New Jersey	No Grace	No Grace	6	6	20
New Mexico	Grace	Grace	4	6	7
New York	No Grace	No Grace	6	6	20
North Carolina	No Grace	Grace	3	3	10
North Dakota	No Grace	No Grace	6	6	10
Ohio	No Grace	No Grace	6	15	5–26
Oklahoma	Grace	Grace	3	5	1–5
Oregon	No Grace	No Grace	6	6	10
Pennsylvania	No Grace	No Grace	6	6	20
Rhode Island	No Grace	Grace	6	6	20
South Carolina	Grace	Grace	6	6	10
South Dakota	Grace	Grace	6	6	20
Tennessee	No Grace	No Grace	6	6	10
Texas	Grace	Grace	2	4	10
Utah	No Grace	No Grace	4	6	8
Vermont	No Grace	No Grace	6	6	8
Virginia	No Grace	No Grace	2–3	5–10	10–20
Washington	No Grace	No Grace	3	6	6
West Virginia	No Grace	No Grace	5	10	10
Wisconsin	No Grace	No Grace	6	6	20
Wyoming	No Grace	No Grace	8	5	5

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google